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No. A-77

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HELEN M. AMBROSE,
Petitioner,

vs.

SPERRY RAND CORPORATION, a Delaware Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Rule 23 (d)(2) and (e) mailed notice(s) to the plaintiff class, under all of the circumstances present, were constitutionally sufficient absent notice of fact and apprisal that co-counsel held appearance of or potential for conflict of interests?

Ruling below: Yes.

2. Whether plaintiff class counsel and co-counsel were adequate representative parties under Rule 23 (a)(4) and constitutionally sufficient representatives for plaintiff class?

Ruling below: Yes.

3. Whether the application of the rules, procedures adopted, and judgments rendered were within the proscriptions of the Rules Enabling Act §2072 (1966) and constitutionally sufficient?

Ruling below: Yes.

4. Whether final judgment order is entitled, under Rule 23 or constitutionally, to full faith and credit?

Ruling below: Yes.

THE PARTIES*

The two parties are listed in the Caption.

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*Petitioner does not intend to abandon claims as to other parties who may later claim or be deemed to be parties of interest.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States Articles of Amendment.

Amendment 5:

> No person shall . . . be deprived of life, liberty or property, without due process of law; . . . .

Amendment 6:

> . . . to have assistance of counsel . . .

Amendment 14:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

The Rules Enabling Act §2072 (1966):

> The Supreme Court shall have the power to prescribe by general rules . . . and the practice and procedure of the district courts and courts of appeals. . .
>
> Such rules shall not abridge, enlarge or modify any substantive right [and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution].

Federal Rules of Civil Procedure Rule 23:

Rule 23 Class Actions:

(a)(4) the representative parties will fairly and adequately protect the interests of the class.

(c)(2) In any class action maintained under (b)(3) the court shall direct to the members of the class the best notice practicable under the circumstances, . . .

(d)(2) requiring for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such a manner as the court may direct to some or all of the members of any step in the action, . . ., or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(d)(3) imposing conditions on the representative parties . . .

(e) A class action shall not be dismissed without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such a manner as the court directs.

STATUTORY PROVISIONS INVOLVED

United States Code Title 28:

§ 455(a). Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, . . .

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner Helen M. Ambrose respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding that is identified as No. 84-5183-MN and entered on March 11, 1985 and upon re-hearing entered on May 13, 1985. No. 81-5183 derives from Civ. 4-74-627

OPINION BELOW

The opinion of the Court of Appeals, not yet recorded, appears in the Appendix hereto as does the relevant orders, judgment and correspondence of the court of first instance.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 11, 1985. A timely petition for rehearing was filed, heard and opinion rendered on May 13, 1985. Petitioner filed a request to the Supreme Court for a time extension in which to file for writ of certiorari on July 20, 1985. Time extension granted to and including September 10, 1985.

This petition is timely filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Named plaintiffs, Delores Elliott (hereinafter Elliott) and Helen Ambrose (hereinafter Ambrose or Petitioner) engaged the law firm of Hvass, Weisman & King[1] (hereinafter Hvass) to file a civil action (4-74 Civ. 627) on behalf of Elliott and Ambrose and all other women similarly situated against Sperry Rand Corporation (hereinafter Sperry), the International Brotherhood of Electrical Workers Union (hereinafter IBEW), and the Local Union No. 2047 of the IBEW (hereinafter L.U. #2047) for sex discrimination in employment under Title VII of the Civil Rights Act of 1964, 42 USC §2000-e *et seq.*, the Labor Management Relations Act, 29 U.S.C. §157 et Seq., etc.

Hvass filed the original Complaint on December 9, 1974 after substantial investigative research whereby Hvass became fully acquainted that the claims made against Sperry and the IBEW Unions which included assembly work, tools and machine operation assignment, inspection job task and testing equipment job assignment. Hvass knew that the dominant area of experience of Ambrose would be in assembly and attendant tool and manufacturing machine operation job assignments and that Elliott's dominant experience would be in Sperry's inspection job tasks and attendant inspection test equipment operation assignments.[2]

---

[1] Plaintiffs came to engage the Hvass firm through the happenstance of seeking aid from MPIRG (Minn. Public Information & Research Group). They agreed to run a "computer sort" (at plaintiffs expense) of the promotion practices of Sperry from a seniority roster supplied by Elliott and Ambrose. The task was assigned to Jean Hvass who was a student and the daughter of Charles Hvass, Sr.

Shortly after filing the Complaint Hvass called a conference to advise Elliott, Ambrose and Roberta Pettit (Pettit, an officer of the Nat'l Organization for Women, was later dismissed for lack of standing to sue) that another client of his office (the Teamster Joint Council #32 of Minnesota) had raised an issue of conflict. Hvass claimed that there was no actual conflict but the complaint went to a remote "appearance" of conflict. No further or specific information was supplied so as to advise plaintiffs of risks to plaintiffs. Instead Hvass advised that he did not wish to spend his time and money only to "possibly" have the judge,

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[2] Hvass was also presumptively aware of the comparatively large Inspection classes in the IBEW group at Sperry (Detail, General Inspector "B" (both lower paid and female dominated) and the higher paid and male dominated General Inspector "A"). Hvass was also presumptively aware of the dominance of the Teamster Inspection classes (60%) at Sperry and the sexual composition of the Teamster group as shown below:

Teamster Classes at Sperry	*No. & Sex of Persons*	
	Male	*Female*
Tool & Die Maker	8	0
Lead Tool & Die Maker	1	0
Tool Rm. & Mod. Shop Machinist	11	0
Experimental Machinist	5	0
Experimental Sheet Metal	3	0
Sheet metal Layout	3	0
Sheet Metal Worker	3	0
Machinist	9	0
Precision Grinder	1	0
Tool & Gage Inspector	15	0
Fabrication Inspector	23	0
Mechanical Receiving Inspection	41	2

at a later date, find an "appearance of conflict" and compel him to withdraw.

Hvass highly recommended the Meagher, Geer, Markham, Anderson, Adamson, Flaskamp & Brennan law firm (hereinafter Meagher, Geer) as one that would give us excellent representation.

Meagher, Geer accepted employment and a Substitution of Attorney was filed on December 23, 1974 and proceeded with discovery, etc. thence foreward.

On or about March 1975 Ambrose, through the efforts of class member Joann M. Clodfelter[3] (hereinafter Clodfelter) and with forms supplied by Ambrose gathered Sperry Inspection job data from several departments at Plant #1 for the purpose of showing disparate treatment of females at those locations. That information was supplied to attorney J. Richard Bland (hereinafter Bland) of the Meagher, Geer firm on or about the time stated above. The Inspection job data consisted of;

1. The name of the department.
2. Complete identification of the Inspection test equipment including; manufacturers name, type of machine, manufacturer's code number, and the Sperry code number for the equipment.
3. Where known, names of males and females engaged in the operation of the test equipment and that females were classed in a lower paid Inspection job class while performing same work as their co-IBEW male Inspectors of the General "A" classification.

Bland did not seek to verify or to expand upon the Clodfelter information throughout litigation.

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[3] Clodfelter and Ambrose supplied the lower courts with the above information with attending affidavits.

On June 27, 1975 Ambrose wrote a letter to Bland requesting that he obtain a census of the machines in use at Sperry through discovery from the IBEW L.U. No. 2047 or from Sperry. Bland did not attempt such discovery. In the same letter Ambrose requested information as to how named plaintiffs might proceed to add other females as representatives who were non-activists or non-controversial in light of the fact that the Defendants were raising such a furor over the representation by Elliott and Ambrose via the complaint that this suit was "politically" motivated. Bland didn't believe that would be necessary.

On or about May 22, 1976 class member Jennie Hodder (hereinafter Hodder) promoted from General Inspector "B" at Sperry's plant No. 1 to Automatic Drilling Machine Operator at Plant No. 4. While at Plant No. 4 she discovered that a male Teamster Inspector was being paid more than she in the performance of the same inspection tasks she performed at Plant No. 1 in the Plating Test Lab. She asked Ambrose to verify her discovery and report same to Bland. Ambrose did so. Therefore, as early as May 1976 Bland knew that Sperry's disparate treatment of females in its Inspection department(s) implicated both the Teamster and the IBEW unions. The Hodder complaint was oft repeated to counsel during trial rest or lunch breaks.[4]

Bland failed to seek discovery of specific Job Data Paks or Inspection Test Logs to verify the Hodder complaints or to impeach the testimony of the adverse witnesses Watali Globa or Lawrence P. Curley (hereinafter Globa and Curley). Moreover, Bland failed to call Hodder as a witness at trial even though she was present, vocal, and available for six (6) of the seven (7) weeks of trial.

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[4] See App. A-76 (Hodder Aff. to Ethics Comm.).

Confirmation of the validity of the Clodfelter research and the Hodder (and Elliott had she been heard) complaint that Sperry paid women Inspectors less than male Inspectors in the performance of same work tasks and in use of same testing equipment would come late in this litigation. That confirmation, known to the lower courts, came in the form of a formal grievance filed by union Steward Mary Harrigan on behalf of five females on July 13, 1982.[5]

On May 27, 1976 Judge Earl R. Larson issued its Memorandum Order (hereinafter MO 1976) (See App. 25-62) conditionally certifying the class under Rule 23(d)(2) requiring notice to the class. The order predominates against named plaintiff's motivation for bringing this action. It marks the predisposition of the court that would surface throughout this litigation and give its final expression in the court's letter to the Eighth Circuit dated March 27, 1985 as shown in pertinent part below: (See App. 72-73).

> "Since 1970 Ms. Ambrose has been engaged in a series of attacks directed to her Local Union, the International Union, her employer, three of her law firms and now myself. The Court of Appeals is the next likely target." M.O. 1976 acknowledges the obligations of the court and counsel to each class member in a class action suit:
>
> "in the task of protecting class members from conflicting interests or ulterior motives, the Court does not stand alone. Counsel for the class are officers of the Court. When attorneys undertake representation of a class, each member of the class becomes a client. The representatives party's attorney thus owes a duty of loyalty, and a duty of zealous representation not only to named party but to all absent parties as well." (MO p. 21).

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[5] See App. 95-96 L.U. No. 2047 Grievance.

The district court also acknowledged that there should be no diminution of due process rights where an entire class will be bound by judgment (See MO 1976 at pp. 11-12) as follows:

> "Where an entire class will be bound by the judgment in the action, placing the fate of the class in the hands of an inadequate representative is plainly repugnant to due process. *Hansberry v. Lee,* 311 U.S. 32 (1940). Effectuation of the social policies embodied in Title VII does not permit the dilution of the due process rights of absent class members."

The most salient feature of MO 1976 is that the court does not admit that upon certification a transfer of control of the suit goes from named parties to the court and to counsel as does the potential for misdeeds, misconduct, fraud or collusion. The omission is the more outstanding in a suit already marked by counselor Hvass' withdrawal for conflict in 1974 and (unknown to named parties until recently) marked by the lower court's own[6] "potential for appearance of conflict" owing to its own prior relationships. (See Chart at App. 77 showing the Larson, Lindquist, Teamster, Hvass, Sperry interconnecting relationships).

Defendant Sperry appealed from MO 1976 via a petition for a Writ of Mandamus in *Sperry Rand Corporation v. Larson,* 544 F.2d 868 (8th Cir. 1977) citing *Hansberry* as to adequacy of representation. Meagher, Geer responded for the lower court citing, inter alia, *Redmond* (8th Cir. 1940) that conflict must go to subject matter to defeat representative status.

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[6] Judge Larson was a law partner of Lindquist for about 15 years prior to his judgeship. That law firm now named Lindquist & Vennum. The Lindquist firm was counsel for the Teamster L.U. No. 970 at Sperry at the time this suit was filed. The Lindquist firm was also involved in the *Reynolds* case before Judge Larson (Reynolds was a union member objecting to settlement). *Reynolds* was cited by the 8th Cir. in denying petitioner's appeal.

The Eighth Circuit, on May 9, 1977, upheld the lower court stating that notice to the class was not fomenting litigation or a tacit recognition of existing antagonism going to subject matter, but was "a prudent safeguard against future antagonisms that might affect the binding nature of a Rule 23(b)(2) judgment." And at note 12 of the court's affirmation expressed about the "marginal nature of class representatives in this case." Following that remark the court expressed confidence that:

> "The experienced district judge will continue to monitor the performance of the class representatives and will take appropriate action if antagonisms going to the merits of the claim surface within the class."

Thus the Eighth Circuit joined the lower court in avoiding the common knowledge that control passed to counsel upon certification as well as the potential to visit harm upon the class.

On January 1, 1978 Elliott terminated her employment at Sperry. On April 17, and May 1, 1978 Sperry and the IBEW filed motions to revoke class certification and alternatively to amend same. On July 12, 1978 the court granted motion to re-define the class but denied motions to deny representative status to Elliott.

On March 30, 1979 Meagher, Geer issued a letter to all defendant counsel (but *not* to Elliott and Ambrose) advising that the Hvass law firm would re-enter this litigation as co-counsel for the plaintiff class. (See App. 23).

On April 9, 1979 Notice of Association of counsel for plaintiffs was filed. (See App. 22). No notice was given to named plaintiffs. No challenges were raised by defendants to the Hvass re-association. The court made no inquiry on the record of the Hvass re-association as to whether a potential for conflict or appearance of conflict still attached to Hvass.

On June 5, 1979 the court ordered that notice be mailed to the class on June 19, 1979. The court approved notice (See App. 63-69 a three page notice) failed to inform the named plaintiffs of the Hvass re-association, or identify his past conflicts relating to his employment by the Teamster Union, or give assurance that no conflict presently attached to Hvass, or to solicit class opinion or consent to the Hvass representation. Instead the notice continued the "strawman" non-issue of adequacy of named plaintiffs who were now merely "the key to the courthouse door" for class counsel.

In the year preceding trial certain experts were hired by Meagher, Geer in support of class claims, more depositions were taken of Sperry management personnel, written statements were accepted from higher level Sperry management in lieu of depositions, one potential and important adverse witness (Sperry vice pres. Ernest Hams) was not located (unable to be subpoenaed for testimony relating to a successful Equal Pay claim by two class members), and on August 24, 1980 Bland sent a letter vaguely requesting Job Data Paks.

Plaintiff's case-in-chief began on September 8, 1980 and would conclude on October 24, 1980. Earlier the court had granted Sperry a bifrucated trial that would permit them to present their case on January 5, 1981.

Richard A. Williams, Jr. (hereinafter Williams) of the Hvass law firm appeared at trial during its second week. Elliott and Ambrose expressed surprise and inquired of Bland whether Williams was our "union expert" in the belief that he was hired as were other experts for their special knowledge, but neither Bland, Williams or Jones made any effort to correct our mistaken belief that Williams was hired as an independent expert. Thus came the "implied consent" of named plaintiffs to the Hvass law firm's representation of the class.

The trial was distinguished by a continuing failure to discover the Job Data Paks, the court severely circumscribed the job analysis (PAQ) by our expert Dr. Mendel, serious errors committed by our expert Dr. Hoyt [due to using a wrong data base], hiring other experts to correct the mistake, and the disproportionate use by Bland of adverse witnesses without benefit of Elliott's testimony or other class member witnesses. That disproportion is shown below:

Plaintiff witness	*Adverse witness*	
H. Ambrose	J. Ellingboe	
*D. Elliott	F. Philipson	
Experts	D. Steenson	Sperry
R. Mendel	P. McDonnell	
R. Hoyt	B. Rienke	
Dr. Strachan	N. Nelson	
Dr. Holloway	P. Curley	
	A. Bonacorda	Union
	W. Globa	
	Sperry experts:	
	J. Hunter—depos. & report	
	D. White—depos. & report	

*Elliott testimony limited to general background. Defendants did not cross-examine.

At the break in trial settlement was briefly discussed and an understanding was reached that Sperry would deliver

Job Data Paks for our review and that Dr. Mendel would return to evaluate our (named plaintiffs and other class members) findings and evaluate same. No job Data Paks were received for said review.

On November 2, 1980 Bland sent a letter to Sperry counselor David S. Doty (hereinafter Doty) of the Popham, Haik, Schnobrich, Kaufman & Doty law firm outlining a proposal for settlement.

On December 12, 1980 Judge Larson, from the bench, denied all defendant's Rule 41(b) Motions to Dismiss. During argument (p. 25) William Z. Pentalovitch (counsel for the IBEW from the law firm of Maslon, Kaplan, Edelman, Borman, Brand & McNaulty) made the following statement in argument:

> "This case could have far reaching implications for the labor movement. Up until now there has been no coherent development of judicial philosophy for applying Title VII to labor unions."

Not surprisingly that view was shared by Hvass' employer-Teamster Union Joint Council who consented to the Hvass representation on the understanding that the Teamster's would not be drawn into this case or one similar to it. (See App. 74-75 December 2, 1980 Carol Grant's letter to Ambrose at p. 1).

On or about December 22, 1980, on a visit to the Meagher, Geer offices Elliott was advised by Jones that;

1. Charles Hvass, Sr. was conducting settlement negotiations with Doty upon Doty's request or preference.
2. Offered the explanation that Hvass represented Doty on another case before the Eighth Circuit in St. Louis.

3. That Hvass never had a conflict but that it was instead a political problem resolved some time ago by the election of new leadership in the Teamster L.U. #970 at Sperry.

During that same time Bland deposed Sperry's experts Dr. Halbert White and Dr. John Hunter and received their reports.

On December 30, 1980 Bland called named plaintiffs to his office to report the Sperry settlement proposals:

1. That the Hunter report had destroyed the class major money claims.

2. That Dr. Mendel had recommended settlement be accepted.

3. Explained that Hvass represented Doty in a case before the Eighth Circuit in St. Louis and justified the Hvass interpolation with the claim that Sperry offered only $750,000 dollars in settlement but that Hvass was able to get 1.5 million for the Class.

4. That he (Bland) could not improve upon the terms proposed and that final language was only thing left to complete.

Elliott and Ambrose made strenuous objections to all aspects of the settlement. We requested a copy of the terms. None was available. Bland requested our response as soon as possible. It is noteworthy that a settlement term "strawman" was included in the settlement terms that was not at issue in trial. The proposed settlement term was to institute "plant" seniority as opposed to the preferred "company wide" seniority and thus debilitating job seniority protection rights. It was a term certain to cause wide-spread panic. It did. That provision was dropped and then "used" to show that named plaintiffs had "input" into the negotiation process.

On January 6, 1981 named plaintiffs were called to a meeting at the Meagher, Geer offices. The "merits" of accepting settlement were discussed with Charles Hvass, Sr., Bland, Williams, and Jones. Named plaintiffs refused to accept or approve settlement terms.

Named plaintiffs telephoned Dr. Mendel to verify his recommendation for settlement as alleged by Bland and discovered that:

> 1. Bland lied to Dr. Mendel in telling him that we had received and reviewed the Sperry Job Data Paks but were unable to discriminatory "cross-over" in job task assignments.
>
> 2. Bland lied to Dr. Mendel by telling him that named plaintiffs had agreed to settlement terms.
>
> 3. That Dr. Mendel did not recommend settlement.
>
> 4. That Dr. Hunter had not "destroyed" our major money claims but that Mendel analysis of the Hunter report only showed both good and bad reasoning and was thus subject to refutation and the court's judgment.
>
> 5. That Mendel was suprised at the 1.5 million settlement because Bland had advised him that that amount was offered at trial.

By letter dated January 13, 1981 Elliott and Ambrose advised the court of our complaints and concern. (See App. A-89). Judge Larson did not acknowledge the letter at any time and appears to deny receipt in his Memorandum Order of May 31, 1984 (at P.3).

On January 15, Elliott suffered a stroke, was hospitalized, recovered sufficient to give further but measured representative effort. The representation efforts made by Elliott, Ambrose, Hodder and other class members include the following;

- Rented meeting halls to conduct open discussions on settlement proposals.
- Named plaintiffs hired counselors Donna L. Roback and Judith M. Wolf (hereinafter Roback and Wolf).
- Conducted several "fund raisers" to pay attorney fees and costs.

On May 20, 1981 class counsel and defendants signed a settlement agreement and a court approved notice was mailed to the class. (See App. 69-71). The notice was defective in the following respect;

1. Hvass was not identified as co-counsel for the class or identified as previously (or presently) harboring conflicts of interest going to issues at trial or of having the potential for conflict owing to the simultaneous representation of the Teamster Unions or of having the appearance of conflict in his representation of Doty.
2. The notice failed to advise the class of all of the settlement terms or that the terms relinquished class counsel representative obligations to the court as to monitoring compliance and enforcement.
3. The notice contained the misleading statement that "The Court must approve this settlement". Thus giving the impression of a "fait accompli" to those who might otherwise object to settlement.
4. The notice failed to advise class members that the named plaintiffs did not approve of the settlement terms.

On July 18, 1981 named plaintiffs filed a complaint against class counselors with the Lawyers Professional Responsibility Board who referred the complaint to the Hennepin County Ethics Committee. Carol Grant (of the Meshbesher, Singer & Spence law firm) was assigned as the investigating attorney. After certain submissions by the parties, Carol Grant issued her findings on November 17, 1981. (See App. 78-79). Ambrose objected.

On December 2, 1981 (See App. 74-75) Carol Grant advised that the investigation would continue and she provided other data obtained from Hvass. That information was that; the Teamsters consented to the Hvass representation of the class on the condition and belief that the Teamsters would not be drawn into this or a similar lawsuit and that; the 1974 conflict issue arose out of the similarity* of machinist type of work between Teamsters and IBEW at Sperry. Ambrose believed that the Machinist Helper class of the IBEW was "dead" class at Sperry and that Hvass lied to Carol Grant. Ambrose researched through seniority rosters of past years and confirmed that belief and submitted that, and other, information to Carol Grant in several subsequent mailings. The information demonstrated that conflict arose out of the Teamster and IBEW Inspection classes. The information was mailed by certified and registered mail. Carol Grant did not respond until March 5, 1982 to advise that the investigation was concluded and she assumed that petitioner was so advised. The LPRB ultimately decided that the case was closed on December 2, 1981 with no finding of fault. Thus the case was closed retroactively to avoid the Hvass misrepresentations to Carol Grant. And thus the lower courts here embraced the LPBR decision in their respective memorandum, opinions and orders.

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*That "similiarity" of work remark marked the "dawning" of named plaintiff's understanding of the Hvass conflicts.

The Fairness Hearing to determine whether the Court should approve or disapprove settlement was had on July 27, 1981 and included the following pertinent events;

1. The court permitted Bland the obviously conflicting role of spokesman for those members in favor of settlement and spokesman, editor, censor, interpretor and critic of those members who opposed settlement.
2. Bland failed to read the Hodder written objection that implicated the Teamsters.
3. Bland disparaged those members who elected to file "form" objections but not those members who "accepted" settlement on little more than faith or resignation.
4. The court failed to advise objecting members of appeal as a matter of right or to appoint counsel in the exercise of that right.
5. Over 700 members objected to settlement of a 3000 member class.

The Fairness Hearing was continued to July 30, 1981 for the purpose of hearing matters relating to attorney fees and costs. The hearing became resounding testimony that the lower court had no intention of applying Rule 23(a)(4) to counsel as it did so vigorously to named plaintiffs in its Memorandum Order of 1976. Defendant counselors and class counselors executed the same 180° turn and stoutly defended the Hvass representation (pp. 188-199 of the Hearing Minutes). (See App. 79-88).

The court refers to the raising of question of attorney conflicts of interest as a "side issue" and complains that "we have enough important problems here to resolve". (pp. 197-98). Thus the integrity of the trial and the due process rights of class were subordinated and cast aside for the "important problem" of determining whether and how much the lawyers were going to be paid.

The court spoke disparagingly with regard to named plaintiffs (p.193).

On August 12, 1981 Judge Larson issued a Memorandum Order with Judgment entered on August 19, 1981 approving class counsel fees and costs and all other terms and conditions of the settlement, but denying attorney fees and costs to named plaintiff's counselors Roback and Wolf.

Roback and Wolf file Notice of Appeal on September 14, 1981 and appeal brief on November 16, 1981 (raising the Hvass conflict issue but failing to cite case authority). Oral argument was had in May, 1982 (at which time named plaintiffs received a copy of the appeal brief and Roback's explanation that she was unable to find any case authority on the Hvass conflict). At least as early as February 5, 1982 Roback and Wolf were aware of the direct conflicts of interest held by Hvass but the appeal was not amended.

On July 23, 1982 the Eighth Circuit upheld the lower court in all respects but reversed on the issue of attorney fees and costs for Roback and Wolf ordering attorney fees to be taken from class counsel's fee award fund. Ultimately, the lower court approved (conditionally) fees in the amount of $20,000 and costs in the amount of $601.77.

Distribution of class monetary award took place after expiration of appeal time limits. Petitioner declines to accept her individual monetary award in continuing protest against this travesty that would parade as a fair trial before an impartial tribunal.

Defendant Sperry filed a Motion for a Final Judgment Order on November 29, 1983 with hearing set for December 6, 1983. Named plaintiffs dismissed Roback and Wolf. Ambrose filed a Motion in Opposition on December 6, and filed Substitution of Attorney *pro se* on December 9, 1983. On December 6, 1983 the court allowed time extensions to the L.U. No. 2047 and to *pro se* plaintiff Ambrose to December 12 and 27 respectively. Class counselors failed to make an appearance on behalf of the class on December 6th and 12th save for Williams, who appeared on the 6th of December but who elected to sit in the spectator section of the court room and remain silent.

On December 27, 1983 the following events transpired;

1. Petitioner filed Notice and Motion to Invalidate Settlement and Stay Order for Judgment with accompanying Memorandum and Affidavits from several class members:

2. Submitted evidence and exhibits to the court, that included Sperry's own records, showing among other things that Sperry was not in compliance with settlement terms in several material ways (promotions and meeting EEOC standards); that Sperry arbitrarily modified settlement terms to merge two job classes; and that Sperry gave arbitrary and capricious interpretation to certain terms, and;

3. Class member Jennie Hodder testified to her previously stated complaints re: Teamster/IBEW male Inspectors being paid at a higher rate of pay than she in the performance of same work, and;

4. L.U. Pres./Bus. Mgr. testified in harmony with Sperry by and large, and;

5. Class counsel Jones appeared on behalf of the class, allegedly, and complained that Final Judgment should not issue for the reasons that Sperry had not established complete compliance but was merely asserting

compliance with settlement terms (save for showing monetary fund distribution efforts); complained that Sperry's counselor Doty had not honored his requests for a copy of the Hay job analysis reports; and Jones opposed the Ambrose Motion to Invalidate Settlement on all points including the Hvass conflicts of interest, and;

6. The court complained that a finding of the Hvass conflicts would necessitate the nullification of all past decisions including those of the Eighth Circuit Court of Appeals, etcetera.

The total record submitted to the court on December 27, 1983, and subsequent to that date, clearly preponderated in favor of this petitioner's position on the issues presented. The court found to the contrary. All petitioner's Motions made prior or subsequent to the December 27, 1983 hearing were denied by the court. Petitioner appealed. (No. 81-5183 MN). The Eighth Circuit Court of Appeals affirmed and (on re-hearing) re-affirmed the lower court. (See App. 1-24). In consequence thereof, petitioner now petitions This Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

There are three reasons for granting the writ. First, the decisions below conflict directly with this Court's decisions in *Hansberry* (1940), *Mullane* (1950), *In re Four Seasons* (1974) and *Evitts* (1985). Those decisions made it clear that courts below who adopt procedures that abridge due process rights of interested parties lose jurisdiction and full faith and credit of judgments and that the "touchstone" of due process is adequacy of representation and fair notice.

Second, the decisions below directly conflict with the Fifth, Sixth, and Fourteenth Amendments to the Constitution as to right to equal protection of all of the laws, adequacy of counsel, and a fair trial before an impartial tribunal.

Third, the decisions below and the procedures adopted directly conflict with the Rules Enabling Act §2072 (1966) which circumscribes the lower courts discretionary power to that which shall not abridge, enlarge or modify substantive rights of parties in interest.

ARGUMENT

I.

THE DECISIONS BELOW ARE IN DIRECT CONFLICT WITH PRIOR RULINGS OF THIS COURT.

This petitioner argues that the Appellate and District court's judgments rendered subsequent to *Sperry Rand Corp. v. Larson,* 554 F.2d 868 directly conflict with This Court's decisions in *Hansberry* (fair notice and adequacy of representative party(s); *Mullane* (informed notice); *Gonzales* (adequacy of representation); and *Evitts* (constitutional right to effective assistance of counsel). Additionally, the decisions below conflict with other circuits or cases in their embrace of this Court's decisions or due process requirements such as: *Pettway v. American Cast Iron Pipe Co.,* (1978) 576 F.2d 1157, 99 S. Ct. 1020; *Greenfield v. Villager Industries Inc.,* 483 F.2d 824 (3rd Cir. 1973); *Redmond v. Commerce Trust Co.,* 144 F.2d 705, 708 (8th Cir. 1944); *Goldstein v. Lees,* 46 C.A. 3d 614 120 Cal. Rptr. 1975; and *Gasior v. Wentz,* 89 N.W. 2d 886.

In consideration of the above cited cases petitioner argues that, in the instant case, the Rule 23 (d)(2) notice to the class (as well as the later 23 (e) notice) was constitutionally deficient and in conflict with *Mullane* for failure to apprise all class members of the Meagher, Geer decision to reassociate the Hvass law firm as class co-counsel and to give all relevant information thereto including facts surrounding the Hvass conflicts of interest; and that prior informed consent was had from the court and defendants but not named plaintiffs. (See *Hansberry* and *Mullane*). (See *Gasior* citing: 7 C.J.S. §80 pp. 898-899 circumscribing attorney from binding client to procedures affecting substantial rights or involving fraud or collusion).

In *Mullane* this Court stated that a constitutional defect (Fourteenth Amendment) in notice is sufficient to deny jurisdiction to the court and deprives judgment(s) of full faith and credit. Therefore, the constitutionally deficient notice here does or *should* nullify judgments rendered by the courts below.

In the court's silent approval or acquiescence in the Hvass re-association the court willfully denied petitioner and all class members rights under FRCP Rule 23(a)(4), *Hansberry, Evitts, Gonzales,* and the Fifth, Sixth, and Fourteenth Amendments to adequate representation and effective counsel. In the conspiracy of silence that, necessarily, surrounded the Hvass re-entry the court and counsel became the witting "captives" of defendant Sperry and defendant IBEW (and Teamster) union's interests. Clearly class counsel could not and did not demand job data discovery on pain of exposing the Larson-Lindquist-Teamster-Hvass-Sperry connections. The fiduciary "guardians" of class members existed only in the more public exhortations of the courts below. (See Mem. Order 1976 pp. 21-22).

A review of the aggressive and continuing assault against the named plaintiffs personally and upon their representative status or "motives" reveals more about the court (and counselor's) prejudice in favor of Teamster/IBEW union interests represented by Hvass and Lindquist law firms Petitioner claims that the lower court's inordinately lengthy dissertation on the "ulterior motives" and risks attending named plaintiff's representation in its memorandum order of 1976 is both fallacious argument and the first manifestation of the court's bias that was confirmed in the court's March 27, 1985 letter to the Eighth Circuit. That the court engaged in fallacious argument is supported by: the court's knowledge that intervenors could be named; in 1975 named plaintiffs suggested that intervenors be joined; and by the *Greenfield* Appeals Court (3rd Cir.) p. 832 at n. 9:

> "Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statements to the contrary is sheer sophistry."

In consideration of the above it becomes manifest that the court could not and did not sit as an impartial tribunal, as this Court and the Constitution would require. The lower court should have recused itself according to U.S.C. 28 §455(a), (b)(1) and surrendered jurisdiction as required under *Mullane* for the constitutional deficiency of a biased tribunal.

Petitioner claims that the Eighth Circuit Court of Appeals acted in defiance of *Mullane's* due process commands under the Fourteenth Amendments in all judgments (subsequent to the Hvass reentry into this case) but particularly with regard to its affirmation of the lower court's judgments of May 31, 1985 and September 10, 1985 attendant to the final judgment order in this case. The Eighth Circuit gave a "rubber stamp" affirmation of the lower court's conclusionary findings in failure to demand confirming evidence from the record as required by the Fourteenth Amendment and the Rules Enabling Act. The Eighth Circuit's conduct conflicts with constitutional requirements and the *Pettway* court at p. 1160:

> "Court of Appeals cannot properly review a district court's findings and conclusions without examining the supporting evidence."

The Fifth Circuit contrasts with the Eighth Circuit in that; the *Pettway* court would also not abide counsel representing the conflicting interests of proponents and opponents of settlement; recognized that class counsel's fee interests may conflict and favor settlement; and would not allow time consumed in litigation or the voluminous file generated to deny due process and equal protection of all of the laws to the class.

Should this Court allow the judgment(s) rendered below to stand uncorrected or unremedied and sufficient to satisfy the due process rights of petitioner and all class members it will have the calamitous effect of signalling that;

1. Named plaintiff client(s) and class member clients have no right of prior informed consent to association of counsel as representatives but that right is reserved to lead class counsel, the court, and to defendants and their counsel.

2. That class counsel can wear two or more hats and represent conflicting interests with impunity.

3. That misinformation or mere mechanics of notice is sufficient to satisfy due process.

4. That perfunctory examination of attorney conflicts satisfies court obligations.

5. That time consumed in discovery and the generating of a voluminous file (not necessarily relevant or useful) will serve to justify large fees, hide inefficiencies or misconduct, and leverage settlement over due process in the name administrative expediency.

6. That activist union members are ill-advised to attempt to exercise two or more of their rights under protective labor and employment laws in the chilling fear of having the protection of neither.

7. That due process for a factory class of women can safely be sacrificed to administrative expediency or the prejudices of the lower courts.

Petitioner claims that the untoward conduct of the courts below and counselors require remedy to the class through the supervisory powers of this Court.

II.

THE DECISIONS BELOW DIRECTLY CONFLICT WITH THE FIFTH, SIXTH & FOURTEENTHS AMENDMENTS TO THE CONSTITUTION

Petitioner argues that the decisions below directly conflict with constitutional rights for all of the reasons, acts of commission or acts of omission set forth in Item I above. The lower court's disregard for the due process rights of petitioner and the plaintiff class may be shown in the contrasting conduct of the lower court with that of the court in *Goldstein*. Where this lower court expressed irritation that the subject of class due process was interfering with the "more important problem" of determining how much the attorneys were going to be paid (See App. 79-88 pp. 197-198) the *Goldstein* court at pp. 618, 619, 624 stated:

> "Fraud or unfairness on the part of counsel will prevent him from services rendered; etc. and citing the Unclean Hands doctrine at note 2; and at p. 619 n.3 that attorney shall not accept employment adverse to client or former client without informed consent . . .; and at p. 624 to quote "[c]ourts do not sit to give effect to . . . illegal contracts. The law is not subsidized to overthrow itself . . .".

Petitioner further argues that inadequate representation at trial, through the Hvass conflicts of interest was compounded by passive monitoring of defendant's implementation of settlement terms by the court. That passivity was further exacerbated by the court's surrender to defendant Sperry's mere assertions of compliance. Passivity is shown by the court's question as to whether settlement agreement contained references to E.E.O.C. requirements (December 12, 1983 hearing at p. 25) and the court's surrender to Sperry's assertions of compliance as found in Doty's statement at p. 134 of December 27, 1983 hearing minutes: "". . . relating to assembly matter. There we rely on the fact that our people have told us that has happened and the union has not raised an issue on that."

Passive resistance to Sperry's mere assertions of compliance was also given by class counselor Jones at the December 27, 1983 hearing. His surrender soon followed in advocating that final judgment should stand.

Petitioner argues that none of the conduct on the part of the court and class counselor, as fiduciaries and guardians of class interests, comport with this Court's decision in *Evetts* with regard to the proscriptions contained in the Fourteenth Amendment against "nominal representation" and the right to due process and equal protection. See below:

> (a) *Nominal representation on an appeal as of right—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.*

Final Judgment should not be allowed to stand for the following reasons:

1. Settlement terms abrogate class counselor's representative obligations to the class as required by the Sixth and Fourteenth Amendments, Rule 23, and the Rules Enabling Act.

2. Monitoring and procedures used by the court of first instance were constitutionally deficient for lack of verification of compliance of each settlement term on the record and thus done in violation of the Rules Enabling Act and in repudiation of the court's memorandum order of May 27, 1976, re: diminution of due process rights of the class.

3. Eighth Circuit's affirmation of district court's ruling was constitutionally deficient under the Fourteenth Amendment and the Rules Enabling Act by failure to demand that the court produce recorded evidence of full compliance.

The preponderance of evidence shows defendants not to be in full compliance wtih settlement terms but, instead, should have been held in contempt of court as required by settlement terms. Class is entitled to all appropriate remedy including judgment by default. Class is entitled to full protection of constitutionally guaranteed rights.

III.

THE DECISIONS BELOW DIRECTLY CONFLICT WITH THE RULES ENABLING ACT, 28 U.S.C. 2072 (1966).

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and the courts of appeals of the United States in civil actions . . .
>
> Such rules shall not abridge, enlarge or modify any substantive right. . . ."

Petitioner argues that the decisions below and the rules and procedures adopted and in the conduct of the acts of commission or omission described in Items I and II above the courts below had the effect of abridging and modifying the substantive rights of petitioner and all other class members. The decisions below should not be allowed to stand because it gives license for the subjugation of the rights of the powerless to the powerful, heaps doubt upon the integrity of the adversarial system, the judiciary, the legal profession, and mocks the trust that the Congress placed in the judiciary to give fair effectuation of the social policies embodied in Title VII.

CONCLUSION

In the rulings below and by the acts of commission or omission as recounted in Items I, II, and III above, the lower courts have arrogated unto themselves special powers or immunities to repugn this Court's prior decisions, disregard the Constitution, the Rules Enabling Act, Judicial Canons and to arbitrarily and capriciously repudiate their own prior decisions. By such conduct the courts abuse process and bring disrespect to their office. Petitioner and the class are entitled to a stable and impartial tribunal, judgment by default, or summary judgment, evidentiary hearings as to attorney conflicts and whether final judgment should issue, recission of all attorney fees to the court system or to the benefit of the class, indemnification to the class for monetary awards collected from Sperry, and any other relief or remedy the Court may deem appropriate including appointment of counsel.

Petitioner respectfully requests the petition for a writ of certiorari be granted.

September 9, 1985.

Respectfully submitted,

HELEN M. AMBROSE
3528 27th Avenue South
Minneapolis, Minnesota 55406
(612) 729-0010
Petitioner Pro Se

85-414 (2)

Supreme Court, U.S.
)
SEP 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. A-77

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HELEN M. AMBROSE,
Petitioner,
vs.
SPERRY RAND CORPORATION, a Delaware Corporation,
Respondent.

APPENDIX

HELEN M. AMBROSE
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Petitioner Pro Se

1985—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
U.S. COURT & CUSTOM HOUSE
1114 Market Street
St. Louis, Missouri 63101

July 19, 1985

Robert D. St. Vrain
Clerk

314-425 5600
FTS: 279-5600

Mr. Frank Dosal, Clerk
U. S. District Court
110 S. Fourth St.
Minneapolis, MN 55401

Re: No. 84-5183-MN Helen Ambrose vs. Sperry Rand Corp., etc., et al. (4-74-627)

Dear Sir:

The mandate of this Court is enclosed together with a receipt therefor in the above case. We would appreciate it if you would sign, date and return the receipt to this office.

Since no timely cost bill was filed, no costs will be taxed on appeal.

Returned are three volumes of transcript and two volumes of transcript.

Sincerely,

ROBERT ST. VRAIN, CLERK
by /s/ E. Hoffman
Deputy Clerk

eh
Enclosures 6

cc: Helen Ambrose
David S. Doty
James T. Hansing
Hyman Edelman
Stewart C. Loper
Richard A. Williams, Jr.
J. Richard Bland

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Helen Ambrose,

Plaintiff,

vs.

Sperry Rand Corp., et al,

Defendant

No. 4-74 Civil 627
USCA #84-5183d

You are hereby notified that in the above-entitled cause, on the 22nd day of July, 1985 we filed certified copy of opinion and judgment from the Court of Appeals, Eighth Circuit that it is hereby adjudged and decreed that the judgment of the District Court is affirmed in accordance with the opinion of this Court. See 8th Circuit Rule 14. March 11, 1985.

FRANCIS E. DOSAL, CLERK
by: /s/ Judith E. Palmer
Deputy Clerk

Helen M. Ambrose
3528 27th Avenue South
Minneapolis, MN. 55406
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Minneapolis, MN. 55402
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715 Cargill Building
Minneapolis, MN. 55402
J. Richard Bland
2250 IDS Center
Minneapolis, MN. 55402

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 84-5183MN

Helen Ambrose,

Appellant,

vs.

Sperry Rand Corp., et al,

Appellees.

September Term, 1984
CV 4-74-627

Appeal from the United States District Court for the District of Minnesota

This appeal from the United States District Court was submitted on the record of the said District Court and briefs of the parties.

Upon consideration of the premises it is hereby adjudged and decreed that the judgment of the District Court is affirmed in accordance with the opinion of this Court. See 8th Circuit Rule 14.

March 11, 1985

A true copy.

ATTEST: /s/ Robert D. St. Vrain
Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT
7/20/85

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain — 314-425-5600
Clerk — FTS: 279-5600

May 13, 1985

Ms. Helen M. Ambrose
3528 27th Avenue South
Minneapolis, MN 55406

Re: No. 84-5183-MN Helen Ambrose vs. Sperry Rand Corp., etc., et al

Dear Ms. Ambrose:

Enclosed is a copy of an order entered by us today at the direction of the court.

Sincerely,
/s/ Michael E. Gans
Michael E. Gans
Chief Deputy

MEG/cgj
Enclosure

cc: Mr. David S. Doty
Mr James T. Hansing
Mr. Hyman Edelman
Mr. Stewart C. Loper
Mr. Richard A. Williams, Jr.
Mr. J. Richard Bland
Ms. Phyllis Farguharson, Court Reporter
Mr. Frank Dosal, Clerk, U.S. District Court

FOR INFO ONLY:
Honorable Earl R. Larson
(4-74-627)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-5183-MN

Helen Ambrose,

Appellant,

vs.

Sperry Rand Corp., etc., et al,

Appellees.

Appeal from the United States District Court for the District of Minnesota

Appellant's motion for reconsideration or to vacate or modify orders and to prevent manifest injustice, having been considered by the court, is denied.

May 13, 1985

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

314-425-5600
FTS: 279-5600

March 11, 1985

Ms. Helen M. Ambrose
Mr. James T. Hansing
Mr. Steward C. Loper
Mr. J. Richard Bland
Mr. Frank Dosal, Clerk (Civ 4 74 627)

Mr. David S. Doty
Mr. Hyman Edelman
Mr. Richard A. Williams

Re: 84-5183 Helen Ambrose v. Sperry Rand Corp., et al Counsel:

Enclosed is a copy of the opinion of this Court filed today in the above case. Judgment in accordance with the opinion is also entered today.

Please consult the appropriate Federal Rules of Appellate Procedure and the Eighth Circuit Rules (15 & 16) for post-opinion procedure, particularly Circuit Rule 16 (d).

Your attention is also directed to Federal Rule of Appellate Procedure 39 and Eighth Circuit Rules 7(f) and 8(j). Itemized and verified bills of cost are to be filed with this office with proof of service within 14 days from this date. We would appreciate it if counsel for the prevailing party would promptly forward to us an itemized bill of costs for the reproduction of the authorized number of copies of their briefs. If the prevailing party fails to submit an itemized bill of cost on a timely basis, this office will assume that the right to recoup costs has been waived. Itemized bills of cost which are not timely filed will not be processed without a special order of the Court. Similarly, objections to requested bills of cost must also be submitted on a timely basis-within 10 days of the bill of costs.

Your prompt attention to this request will be appreciated.

Sincerely,

/s/ Robert D. St. Vrain
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-5183

Delores Elliott,
Helen Ambrose,

Appellants,

Roberta Pettit, and all other persons similarly situated,

v.

Sperry Rand Corporation, a Delaware corporation, The International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of The International Brotherhood of Electrical Workers,

Appellees.

Appeal from the United States District Court for the District of Minnesota

Submitted: February 12, 1985
Filed: March 11, 1985

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

PER CURIAM.

This appeal is from a May 31, 1984 order of the district court denying certain post-judgment relief following an approved settlement in a sex discrimination lawsuit brought against Sperry Rand Corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and the local union. Appellant, Helen Ambrose, is an individual plaintiff who sought by a post-judgment motion and now seeks by this appeal to upset the approved settlement by her attack on the ethics, impartiality, conflict of interests, and fee award of certain counsel members of the Hvass law firm, who represented plaintiffs. The appellees contend the district court properly terminated the action by granting Sperry Rand's motion to dismiss with prejudice, thereby refusing to invalidate the settlement.

The voluminous record shows that the settlement was signed by the parties May 20, 1981, approved by the district court August 11, 1981, and affirmed by decision of this court filed on June 23, 1982. The eight-page memorandum of the district court dated May 31, 1984, which accompanied the appealed order now before this court, shows the district court considered and ruled on the claims of plaintiff-appellant, concluding defendant Sperry Rand had complied with the terms of the stipulated settlement agreement and that plaintiffs' counsel had done an excellent job. The court agreed with the conclusion of the Ethics Committee of the Hennepin County Bar Association and the Lawyers Professional Responsibility Board that the ethics complaint should be dismissed and found no conflict of interests. The district court noted Sperry Rand agreed to arbitrate any disputes which remain and mentioned one dispute over posting of first line supervisory positions and another over access to two reports. The court found the misunderstanding and dispute over those two matters had been resolved and opined that any other disputes could be resolved in grievance procedures, arbitration, or by administrative agencies.

The district court calculated the considerable risks to plaintiffs of starting the litigation over and concluded, "After 10 years the entire matter should be put to rest."

The standard of review of this approved settlement is whether the district court abused its discretion. *Elliott v. Sperry Rand Corp.*, 680 F.2d 1225 (8th Cir. 1982); *Reynolds v. National Football League,* 584 F.2d 280 (8th Cir. 1978) The thorough May 31, 1984 memorandum shows the district court diligently and carefully considered the attacks on the settlement and plaintiffs' counsel.

We find no indication that the district court abused its discretion. No error of law or fact appearing and it being clear that further expression by us would have no precedential value, the judgment of the district court is affirmed. *See* 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, Roberta Pettit, and all other persons similarly situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

ORDER

4-74-Civil-627

On May 31, 1984 I filed 2 Orders and a separate Memorandum.

One Order denied the motion of pro se plaintiff Ambrose to Invalidate Settlement, to Stay Order for Judgment and for a New Trial on all issues. The motion was based on a claimed conflict of interest of one of the law firms representing the named plaintiffs and the class.

A second Order granted the motion of defendant Sperry Rand for an Order dismissing the action as to all parties and discharging from further supervisory jurisdiction of the Court In this Order I reviewed some of the history of the case and Sperry's compliance and also disposed of several minor matters.

The Memorandum reviewed the history of the litigation and made reference to a claim of possible conflict of interest on the part of the Hvass law firm. I stated that this claim was not raised during the extended trial or the settlement negotiations nor in the Court of Appeals.

On June 8, 1984 Ms. Ambrose filed a Motion for New Trial and Amendment of Judgments and stated that a supporting Memorandum and affidavits would be submitted within 20 days. The additional materials were submitted on July 18, 1984.

I will treat the June 8 motion as a Motion for Reconsideration of the May 31 Orders.

On June 8 Ms. Ambrose also filed a Notice of Appeal and on June 15 a notice to clerk to Transmit and Certify a Designated Record and Settlement of Issues.

I am also in receipt of an exchange of correspondence between Ms. Ambrose and attorneys Roback and Wolf, the latest attorneys to represent Ms. Ambrose.

The last Ambrose letter was received on August 27, 1984. The correspondence relates to a private dispute as to attorneys fees and will not be considered by me.

Though an appeal appears to be pending I will treat the latest motions as Motions for Reconsideration.

I have considered the Motions, Memoranda, Affidavits and Exhibits. No further hearing or argument is needed or would be productive.

Ms. Ambrose charges me with bias and fatigue. I deny the bias but admit the fatigue.

IT IS ORDERED:

1. That the June 8, 1984 Motion for New Trial and Amendment of Judgment be denied.

2. That the Motion for Reconsideration of the 2 May 31, 1984 Orders and Memorandum be denied.

September 10, 1984.

/s/ Signature illegible
United States Senior District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, et al,

Plaintiff,

vs.

Sperry Rand Corporation, et al,

Defendant.

No. 4-74 Civil 627

Clerk's Notice under Rule 77(d) F.R. Civil Procedure or Rule 49(c) F.R. Criminal Procedure

You are hereby notified that in the above-entitled cause, on the 10th day of September, 1984 we filed Judge Larson's Order 1. That the June 8, 1984 motion for new trial and amendment of Judgment be denied. 2. That the motion for reconsideration of the May 2, 1984 Orders and Memorandum be denied.

FRANCIS E. DOSAL, CLERK
By ________________
Deputy Clerk

Helen M. Ambrose
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Minneapolis, MN 55405

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Bradley M. Jones
2250 IDS Tower
Minneapolis, MN 55402

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, Roberta Pettit, and all other persons similarly situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

ORDER

4-74-Civil 627

Defendant Sperry Rand Corporation (Sperry) has moved for an Order for Judgment dismissing the action as to all parties and discharging the parties from the supervisory jurisdiction of this Court.

The Court held 3 hearings in December 1983 and since then has considered various affidavits, letters and memoranda which have been submitted to the Court.

On August 11, 1981 the Court entered an Order approving the Stipulation of Settlement which had been entered into by the parties on May 20, 1981. The Court also determined that the Settlement was fair, adequate and reasonable. The Court of Appeals on June 23, 1982 affirmed this Court's determination.

The Court finds that the parties have complied with the Stipulation and this Court's Orders. Sperry has paid the class members $1,762,618.47. The sum of $1,794.67 remains unclaimed in the settlement fund. Sperry has also complied with the Court's Order relating to the payment of attorneys fees and costs to class counsel. In addition Sperry and the Local Union have modified the collective bargaining agreement as agreed to. Sperry has furnished to the Court the Hays studies, has established appropriate jobs in Plating and Electro-Mechanical areas for assemblers, has established selection criteria for first line supervisors, has encouraged employees to avail themselves of its tuition reimbursement program and has provided notice to employees of the criteria for promotion to various jobs.

IT IS HEREBY ORDERED THAT:

1. The action is dismissed in all its counts and claims as to all parties with prejudice.

2. Class members are barred and enjoined from prosecuting any other action involving the claims of the class action complaint and defendants are barred and enjoined from prosecuting any action against a class member arising from a claim embraced in the class complaint or for defense costs or fees.

3. The parties be discharged from the supervisory jurisdiction of this Court arising from the previous Orders of this Court, the Stipulation of Settlement and the power granted to the Court by Rule 23 relating to class actions.

4. Sperry pay to 5 employees or former class members employees—Axtell, Turnipseed, Olson, Silva and Turner—the amounts due them upon proof of membership in the class and their entitlement to payment.

5. Sperry within 10 days pay the sum of $1,794.67 into the Clerk's registry fund. The list of 22 class members and the amounts due them is Attachment 1 to the Achterhof Affidavit (Clerk's Folder IX-1). Sperry will within 15 days file with the Clerk a supplemental list which will include first names, the most recent address and any other identifying information. Payment to the class members will be made by the Clerk upon the submission of a claim and proper proof. After 5 years the Clerk will remit the balance remaining in the fund to the Treasurer of the United States.

Let Judgment be Entered Accordingly.

May 31, 1984.

/s/ Earl R. Larson
United States Senior District Judge

Separate Memorandum Filed

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, Roberta Pettit, and all other persons similarly situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware Corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

ORDER

4-74-Civil-627

Helen M. Ambrose as Pro Se Plaintiff filed a motion on January 3, 1984 to Invalidate Settlement and to Stay Order for Judgment. The motion also requests the Court to set aside previous findings, opinions and judgments, to permit further discovery, and for a new trial on all issues held by the Hvass law firm which acted as co-counsel for the plaintiff class.

The Court has considered the motion, affidavit, memoranda and letters, and the claims and arguments of the parties.

The Court refers the parties and counsel to the separate Memorandum to be filed.

IT IS ORDERED:

That the motion be denied.

May 31, 1984.

/s/ Earl R. Larson
United States Senior District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, et al,
Plaintiff(s),
vs.
Sperry Rand Corp., et al,
Defendant(s).

No. 4-74- Civil 627

Clerk's Notice under Rule 77(d) F.R. Civil Procedure or Rule 49(c) F.R. Criminal Procedure

You are hereby notified that in the above-entitled cause, on the 31st day of May, 1984, we filed Judge Larson's

Order that Helen M. Ambrose's motion be denied. We also filed Judge Larson's Memorandum.

ROBERT E. HESS, CLERK
By: ——————
Deputy Clerk

J. Richard Bland
Richard A. Williams, Jr.
Steward C. Loper
Helen Ambrose
David S. Doty
James T. Hansing
Hyman Edelman

(Title of Cause.)

No. 4-74 Civil 627

Clerk's Notice under Rule 77(d) F.R. Civil Procedure or Rule 49(c) F.R. Criminal Procedure

You are hereby notified that in the above-entitled cause, on the 31st day of May, 1984, we filed Judge Larson's Order as follows:

1. The action is dismissed in all its counts and claims as to all parties with prejudice; 2. Class members are barred and enjoined from prosecution any other action involving the claims of the class action complaint and defendants are barred and enjoined from prosecuting any action against a class member arising from a claim embraced in the class complaint or for defense costs or fees. 3. The parties be discharged from the supervisory jurisdiction of this Court arising from the previous Orders of this Court, the

Stipulation of Settlement and the power granted to the Court by Rule 23 relating to class actions; 4. Sperry pay to five employees or former class members employees—Axtell, Turnipseed, Olson, Silva and Turner—the amounts due them upon proof of membership in the class and their entitlement to payment; 5. Sperry within 10 days pay the sum of $1,794.67 into the Clerk's registry fund. The list of 22 class members and the amounts due them is Attachment 1 to the Achterhof Affidavit (Clerk's Folder IX-1). Sperry will within 15 days file with the Clerk a supplemental list which will include first names, the most recent address and any other identifying information. Payment to the class members will be made by the Clerk upon the submission of a claim and proper proof. After five years, the Clerk will remit the balance remaining in the fund to the Treasurer of the United States. Judgment was entered accordingly.

ROBERT E. HESS, CLERK
By: ______________
Deputy Clerk

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Minneapolis, MN 55402

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, and all other persons similarly situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO. and Local 2047 of the Electrical Workers,

Defendants.

No. 4-74 Civ. 627

NOTICE OF ASSOCIATION OF COUNSEL

TO DEFENDANT SPERRY RAND CORPORATION and DAVID S. DOTY, its attorney:

DEFENDANT INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS and JAMES T. HANSING, its attorney; and

DEFENDANT LOCAL 2047 and HYMAN EDELMAN, its attorney:

PLEASE TAKE NOTICE that the undersigned are hereby associated with Meagher, Geer, Markham, Anderson, Adamson, Flaskamp & Brennan, 2250 IDS Center, Minneapolis, Mn 55402, as attorneys for the plaintiffs in the above captioned matter.

HVASS, WEISMAN & KING
By /s/ Richard A. Williams, Jr.
715 Cargill Building
Minneapolis, MN 55402
333-0201

We hereby consent to the above association of counsel

MEAGHER, GEER, MARKHAM, ANDERSON, ADAMSON, FLASKAMP & BRENNAN
By /s/ J. Richard Bland
2250 IDS Center
Minneapolis, MN 55402
338-0661

Dated: ______________, 1979.

STATE OF MINNESOTA
ss.
COUNTY OF HENNEPIN

AFFIDAVIT OF SERVICE BY MAIL

Melba H. Bylund, being first duly sworn, deposes and says: That on the 30th day of March, 1979, she served the attached Notice of Association of Counsel upon the following attorneys representing the parties as indicated, by depositing a true and correct copy thereof in the U. S. Mail in the City of Minneapolis, Hennepin County, Minnesota, with postage prepaid, in an envelope directed and addressed to said attorneys.

David S. Doty
Attorney for Sperry Rand Corp.
4344 IDS Center
Minneapolis, MN 55402

James T Hansing
Attorney for Local Union No. 2047
656 IDS Center
Minneapolis, MN 55402

Hyman Edelman
Attorney for International Brotherhood
of Electric Workers
1800 Midwest Plaza Building
Minneapolis, MN 55402

Subscribed and sworn to before me this 30th day of March, 1979.

/s/ Carla M. Stevenson
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, Roberta Pettit, and all other persons similarly situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware Corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

MEMORANDUM ORDER

No. 4-74-Civ. 627

Plaintiffs bring this action against defendants Sperry Rand Corporation, doing business through its Univac Division (hereinafter "Univac"), Local Union No. 2047 of the International Brotherhood of Electrical Workers (hereinafter "Local"), and the International Brotherhood of Electrical Workers, AFL-CIO (hereinafter "International"). Plaintiffs allege that defendants engage in a pattern or practice of sex discrimination, and plaintiffs assert claims (1) or violation of the "Back Pay Act of 1963," 29 U.S.C. § 206); (2) for violation of the unions' duty of fair representation and for Univac's breach of contract, and (3) for violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 200-e, *et seq*. Plaintiffs seek to maintain this action as a class action. Before the Court for decision are cross motions for an Order certifying and decertifying the purported class under Rule 23(c) (1).

I. *BACK PAY ACT.*

Claims arising under 29 U.S.C. § 206 are governed by the procedural provisions of 29 U.S.C. § 216(b). The "opt in" procedure of § 216(b) is totally inconsistent with the "opt out" procedure of Rule 23(b) (3) and is equally inconsistent with the binding effect of Rule 23(b) (2) class actions. Rule 23 and § 216(b) are irreconcilable. *Schmidt v. Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975); *see also, Cavanaugh v. Minneapolis Aquatennial Assoc.*, No. 4-75-Civ. 628 (D. Minn. May 3, 1976) Slip Op. at 5-6. Plaintiffs' Back Pay Act claim cannot be maintained as a Rule 23 class action.

Filed May 28, 1976

Harry A. Sieben, Clerk
By /s/ Cyndee Beneon
Deputy

II. *DUTY OF FAIR REPRESENTATION AND BREACH OF CONTRACT.*

The burden of establishing that a case is appropriate for treatment as a class action is on the plaintiffs. With respect to their representation/breach of contract claim, plaintiffs have failed to discharge this burden.

The complaint alleges a typical claim under *Vaca v. Sipes* 386 U.S. 171 (1967), involving the employer's breach of contract and the union's bad faith failure to discharge its duty as the exclusive representative of its employees in processing grievances under the contract. The questions of law and fact underlying a typical *Vaca v. Sipes* claim pertain to the processing of grievances; the employees who may have claims are those whose grievances were improperly processed. Certainly, in order to maintain a *Vaca* type class action, plaintiffs must at the least identify those grievances which the union has improperly handled and which may give rise to common claims among an identifiable class of persons. Plaintiffs have identified no such grievances. If there are persons with claims for the perfunctory processing of grievances, the Court does not know who they are, what the subject matter of their grievances is, or what steps if any the defendant unions took in processing those grievances. There is simply no basis for certification of a typical *Vaca v. Sipes* class action.

In fairness to plaintiffs, it must be emphasized that plaintiffs apparently do not rely on the non*-processing* of filed grievances. Rather, plaintiffs argue, the gravamen of there action is the unions' failure to *initiate* grievance procedures, *i.e.*, the failure to file grievances after receipt of complaints by union members alleging sex discrimination in violation of the non-discrimination clause of the collective bargaining agreement. However, this theory of unfair representation is essentially identical to a traditional *Vaca v Sipes* grievance processing claim, for in both cases liability is premised on a breach of contract by the employer and on the union's breach of its duty to represent the employees under the grievance machinery of the contract. The ". . . necessary condition precedent to suit . . ." in either case is the exhaustion by the employee of those steps in the grievance procedure which the employee has power to invoke. *Butler v. Local Union 823, International Brotherhood of Teamsters, Etc.*, 514 F.2d 442, 449-50 and n.11 (8th Cir. 1975), *cert. denied*, 423 U.S. 924 (1975). The theories are different only in that in the latter case employees are alleged to have exhausted their individual recourse under the grievance procedure simply upon making complaints to the union, notwithstanding the employee's failure to file a grievance. In their complaint, plaintiffs do allege that the unions have exclusive authority under the relevant collective bargaining agreements to *initiate* grievances. If this is true, *i.e.*, if the employee herself is not authorized to file grievances against the employer, then the making of complaints to the union may be sufficient exhaustion of the grievance machinery to lay the foundation for an unfair representation claim against the unions and a breach of contract claim against the employer.

Even under this approach, however, the class proponent should identify those particular complaints which the union is alleged to have abandoned or ignored in violation of its duty of fair representation. The Court should at a minimum be informed as to the subject matter of the complaints and the number of persons involved in the complaints, so that some rational decision may be had as to the questions of numerosity, typicality, and commonality. Rule 23(a) (1), (2) and (3). Although the record indicates that a great many complaints have been directed to the unions during the last several years, plaintiffs have not specified which complaints form the basis for the claims to class relief, and this Court cannot certify a class action on the basis of its own speculations as to which complaints plaintiffs may believe give rise to liability.

Additionally, the record is presently inadequate for class certification because there is no evidence that in fact the unions do have exclusive control over the initiation of grievances. Plaintiffs' allegations of exclusive union control, stated in their complaint, have been denied by all three defendants, and the contractual provisions referred to in the complaint have not been set forth on the record. In her deposition, plaintiff Elliott seems to have admitted that exclusive authority to initiate and pursue grievances may not be in the unions:

> "The procedure is not for an individual to do so. You must accost [sic] it through the union *if possible. If they reject this, then you can do it on your own,* but our procedure is that the union will pursue it." [Emphasis supplied.]

Although plaintiffs at this time are not required to prove that their claim is meritorious, in the Court's view plaintiffs should demonstrate that some state of facts exists which may justify class-wide relief under the legal theory which plaintiffs advance. The Court is entitled to know what the grievance procedure language is before being asked to certify a class under plaintiffs' "grievance initiation" theory.

Plaintiffs have failed to demonstrate the appropriateness of class treatment of the unfair representation/breach of contract claims. Since this action has been pending for over a year, and since the parties have engaged in extensive discovery directed to the questions of maintenance of the case as a class action, plaintiffs' failure to satisfy their burden is a sufficient ground to order conditional decertification of the class with respect to these claims.

III. *TITLE VII.*

It is settled law that Title VII cases are well suited for treatment as class actions. Part III, B., (2), *ante*. In order to maintain a Title VII action as a class action, plaintiffs must satisfy all the prerequisites of Rule 23(a), in addition to one of the requirements of Rule 23(b). *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968).

A. *Rule 23(a) (1), (2) and (3).*

The Court is satisfied that plaintiffs easily fulfill the requirements of numerosity, commonality and typicality. Rule 23(a) (1), (2) and (3). Defendant unions concede as much, although the Local argues that *if* Rule 23(a) (3) is a truly separate requirement, plaintiffs have not satisfied it. Univac's arguments focus on the pleadings and largely overlook the extensive discovery materials which have been generated.

In employment discrimination cases, the numerosity requirement has not been stringently applied. *Arkansas Education Association v. Board of Education*, 446 F.2d 763, 765-66 (8th Cir. 1971) (less than two dozen). The materials on file demonstrate that the prospective class contains in excess of 2,000 members. Joinder of all such persons in a single action is patently impracticable.

Plaintiffs allege that defendants follow a policy or practice of discrimination based on sex in connection with, inter alia, training, promotions, seniority systems, hiring, and maintenance of job classifications. The discrimination alleged is based on a characteristic common to the class. Common questions of law and fact exist concerning the nature of defendants' practices, the effect of these practices on class members, and the legality of these practices under Title VII. A liberal construction of Rule 23(a) (2) and (3) is appropriate in Title VII cases, *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 311 (6th Cir. 1975).

The same is true as to the typicality requirement of Rule 23(a) (3). Plaintiffs Elliott and Ambrose have each been employed by Univac and have been members of the Local and International for over 20 years. Plaintiffs allege that during their employment at Univac they have been promoted only three or four times, and that they have been continuously subjected to defendants' discriminatory practices. Plaintiff Elliott currently holds the position of General Inspector "B". Plaintiffs claim that the formation of two General Inspector classifications, "A" and "B", was discriminatory in that females were "funneled" into the lower paying "B" classification and in that the opportunities for advancement are significantly greater in the predominantly male (118 males, 1 female) "A" classification. The complaint alleges that the plaintiffs, as well as the class

> ". . . have been and are being deprived of income in the form of wages and of prospective retirement benefits, social security and other benefits due to them as workers, solely because of their sex. . . ."

Defendant Univac argues that it is impossible for the Court to determine whether plaintiffs' claims are typical of the claims of the class because plaintiffs have failed to specify what their individual claims are. It is true that plaintiffs have not set forth specific incidents (such as firing, demotion or lay off) which form the basis for their individual claims. However, plaintiffs' personal claims are not at all obscure. Plaintiffs claim that defendants' practices have denied plaintiffs opportunities for advancement, that this denial has been solely due to plaintiffs' sex, and that as a result of this denial plaintiffs have suffered economic detriment. The basis for plaintiff Elliott's claim is particularly clear, since she occupies a job position which is directly tied into defendants' allegedly discriminatory denial of advancement opportunities[1] and claimed relegation of women to lower paying positions. The individual claims are typical of the claims of the class.

The fact that plaintiffs, after over 20 years' employment at Univac, now hold some of the higher paying jobs in the bargaining unit does not render their claims atypical. As of May 3, 1975, plaintiffs earned \$4.54 and \$4.49 per hour. less than \$1.35 per hour more than the lowest paid new employees in the bargaining unit, and less than \$0.40 an hour more than employees with only two years' experience. Plaintiffs' *relatively* higher paying jobs do not set them apart from the class they seek to represent.

Univac argues that because the various jobs at its plants have no common criteria and can be visualized as discrete entities, plaintiffs' claims cannot be typical of the claims of those occupying entirely separate positions. The fact that varying fact patterns may exist is generally considered immaterial, where all claims are based on the same remedial or legal theory, and especially where the common theory is similarly central to all claims. *See generally,* 7 Wright & Miller, Federal Practice and Procedure: Civil § 1764 (1972). In the present case, the claims of the class are based on an identical theory which is central to all, and the possible existence of discrete factual situations is unimportant, particularly in a Title VII action where courts exercise liberality in applying Rule 23(a) (3).

---

[1] Since plaintiffs do allege individual claims, Univac's arguments that plaintiffs cannot represent the class because they have not stated personal claims for relief and because they are not aggrieved persons within the meaning of Title VII are not persuasive.

B. *Rule 23(a) (4).*

(1) *Factual background—*

The critical question regarding class certification under Title VII is whether plaintiffs will fairly and adequately represent the interests of the class. Rule 23(a) (4). Defendants direct the Court's attention to five sources of alleged antagonism between plaintiffs and the class which in defendants' view demonstrates that plaintiffs cannot be adequate representatives.

The first source of antagonism concerns plaintiffs' management of union affairs from 1968 until 1970. In June 1968 plaintiff Elliott was elected president of the Local and plaintiff Ambrose was elected to the Local's Executive Board. From that time until their removal from office in 1970 both plaintiffs were key figures in various disputes within the Union. These difficulties began soon after plaintiffs took office and centered on the organizational structure and internal procedures of the Local. Plaintiffs believed the office of president should be a full time position, whereas certain other officers believed that only the business manager should act in a full time capacity. Plaintiffs prevailed on this issue, and beginning in the fall of 1968 the Local operated with two full time officers. A number of disputes arose concerning the respective responsibilities of the president and the business manager and concerning the Executive Board's policy making function. Other disagreements involved the sending of ten union members to a labor law convention in Texas, the handling of two controversial grievances, the tape recording of union meetings, and the plaintiffs' involvement in antiwar activities.

In 1969 a prenegotiating committee was established in anticipation of the 1970 contract negotiations. In the fall of 1969 plaintiff Elliott retained an attorney to assist her and the union in this regard. This action was strongly opposed by the business manager, who regularly employed different counsel on behalf of the Local. Plaintiff Elliott's attorney introduced plaintiffs and other members of the prenegotiating committee to a Mr. Morris. In the spring of 1970 Morris spearheaded an attempted "raid" on the Local by an unaffiliated union. This raid was initiated by a mailing to all members of the Local. Elliott's attorney withdrew from representing the Local, stating his belief that the raiding union would better represent Univac's employees than did the Local and noting his conflict of interest. Defendants suggest that the mailing list used by Morris came from plaintiff Elliott. In her deposition Elliott denied that she provided such a list, and both Elliott and Ambrose stated that they had no prior knowledge of the raid or of Morris' involvement with the raiding union. Both plaintiffs signed a statement opposing the raid. Neither plaintiff signed an authorization card for the raiding union. Beyond this, neither took any steps to prevent the raid. Plaintiffs assert that it was made clear to them that responsibility for such opposition lay with the business manager and not with the president or the Executive Board. Ambrose prepared certain leaflets or flyers setting forth members' rights under the Labor-Management Reporting and Disclosure Act and sought to assure members of their right to sign authorization cards for the raiding union if they chose to do so. Ambrose believed that the Local was attempting to intimidate its members, and she believed it was her responsibility as a union officer to attempt to clarify members' rights. She felt that the raid was a useful lever in the impending negotiations. Defendants argue that plaintiffs' actions and inactions regarding the raid constituted a serious breach of their fiduciary duties as union officers.

It is clear to the Court that there were serious and repeated disagreements within the Local during this period. These conflicts unquestionably involved the then union leadership and the supporters of the opposing factions. The extent of rank-and-file involvement is uncertain.

Defendants argue secondly that, apart from the actual dissension which occurred from 1968-1970, plaintiffs, by virtue of their positions as active and important union officers during this period, possess interests which inherently conflict with those of the class. As vigorous advocates for the rights of women and minorities, and as negotiators of the 1970 collective bargaining agreement, plaintiffs may indeed be the most important witnesses for the Local with respect to questions of liability for the period when plaintiffs were officers of the Local.

Third, in 1970 plaintiffs were removed from office by the International and were suspended from holding offices for five years. A trusteeship was imposed upon the Local by the International. Since their removal, plaintiffs have initiated proceedings against the defendant unions on three occasions. In 1970 plaintiff Elliott brought an action in Ramsey County District Court against the International challenging her removal and seeking reinstatement. Although the affirmative relief Elliott seeks in that case has become moot, Elliott still desires to pursue that action in order to vindicate herself. In 1971 plaintiffs brought charges before the Secretary of Labor challenging the Local's election, which was held after the trusteeship was removed. The Secretary found that plaintiffs' charges lacked merit. In 1974 plaintiffs again filed charges with the Secretary of Labor, seeking to have the 1974 Local election set aside. The Secretary found merit in plaintiffs' claim and has brought an action which is now pending in Federal District Court in St. Paul. Since their removal plaintiffs have also complained on numerous occasions to the Local about a wide variety of matters. Defendants characterize the bringing of these charges and complaints as part of a pattern of attempted retaliation against the unions for plaintiffs' removal from office. Defendants claim that the present action is likewise motivated in large measure by plaintiffs' desire for vindication and that plaintiffs thus possess unique interests in this action which are antagonistic to and are not shared by the class.

Fourth, defendants claim that the class itself does not perceive plaintiffs to be proper or adequate representatives. Following the filing of this lawsuit, the Local held a regularly scheduled meeting on December 12, 1974. As is customary, the meeting was conducted in two segments to accommodate members who work on separate shifts. At the second meeting 101 members were present. By a vote of 83-0 a resolution was passed expressing nonsupport for this lawsuit. Subsequent to this meeting, the Local's business manager, Mr. Curley, received a number of unsolicited petitions stating that the signators are not involved in this action and do not wish to be represented by the named plaintiffs. The petitions contain 372 signatures.

Fifth, defendants note that plaintiffs have been activists in union affairs and that their disability from holding union office has now ended. Defendants argue that plaintiffs may well attempt to run for office again and may use this lawsuit to advance their political objectives. In their depositions, plaintiffs indicate that they have no present plans to campaign for office, but they have certainly not ruled out that possibility, which has been suggested to them by members of the Local. In view of plaintiffs' obviously keen interest in union affairs, the probability that these plaintiffs may again seek elective offices within their union is substantial.

(2) *The nature of Title VII suits generally and of Title VII class actions*

In assessing whether this evidence of antagonism is sufficient to demonstrate that plaintiffs do not satisfy the requirements of Rule 23(a) (4), it is important to understand the nature of Title VII actions, for the relationship between Title VII and Rule 23 is in a sense unique.

It is well recognized that when an individual plaintiff brings an action under Title VII alleging a general policy of discrimination, her lawsuit may be a vehicle for vindicating important social policies and not only for righting individual wrongs. *Williams v. General Foods Corp.*, 492 F.2d 399, 406 (7th Cir. 1974). Not only racial discrimination, but sex discrimination as well, is by definition class discrimination. *Oatis v. Crown Zellerbach Corp., supra,* 398 F.2d at 499; *Bowe v. Colgate-Palmolive Co.*, 416

F.2d 711, 719 (7th Cir. 1969). It has been said that a Title VII suit, "[w]hether in name or not, . . . is perforce a sort of class action for fellow employees similarly situated." *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968); *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 50 (5th Cir. 1974) (Wisdom, J.) (hereinafter *Rodriguez*). It is familiar learning that a single charge of employment discrimination may form the basis for a full inquiry into the unlawful employment practices of defendants. *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 425 (8th Cir. 1970); *Wright v. Stone Container Corp.*, 524 F.2d 1058, 1062 (8th Cir. 1975).

Since Title VII actions are inherently well adapted to class action treatment, courts have been quite liberal in applying the prerequisites of Rule 23(a) *Rodriguez supra*. As a consequence, the question of whether a court in a *non*-class action is nonetheless empowered under Title VII to grant appropriate class wide relief has arisen infrequently. In *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1201-1202 (7th Cir. 1971) (hereinafter *Sprogis), cert. denied,* 404 U.S. 991 (1971), the Court held that:

> " . . . Rule 23 to the contrary notwithstanding, the district court possesses such power in Title VII cases."

See, 7 Wright & Miller, *supra*, § 1771 at 663-64. *cf., Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 353 n.3 (7th Cir. 1975) (*Sprogis* a specialized rule in Title VII cases, which may or may not withstand intervening Supreme Court decisions). The Fifth Circuit reached a contrary result in *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 163-64 (5th Cir. 1971), *petition for rehearing and rehearing en banc denied,* 450 F.2d 881 (1971) (Tuttle, Brown and Wisdom, JJ., dissenting) (hereinafter *Danner)*, a case in which plaintiff sought relief solely on her own behalf and never attempted to champion the rights of similarly situated employees.

In the present case plaintiffs allege they have been harmed by a policy of class-wide discrimination practiced by defendants, and it seems probable that plaintiffs will proceed at trial by means of evidence, such as statistical disparities, which demonstrates class discrimination, and which calls for class relief. Should plaintiffs prevail on their individual claims, it would be anomalous for a Federal District Court, having found that class-wide discrimination is being practiced in contravention of Title VII, and being armed by Title VII with a full panoply of equitable powers to remedy such discrimination, to stay its hand and in effect sanction the continued violation of Title VII. *Cf., Jenkins v. United Gas Corp., supra*, 400 F.2d at 34 and n.15; *but see, Danner, supra*. In related circumstances courts have found that the duty of the judiciary to grant full relief under Title VII mandates the joinder of additional parties late in the proceedings, *Gilmore v. Kansas City Terminal Railway Co.*, 509 F.2d 48, 52-53 (8th Cir. 1975), or the belated certification of the class for purposes of back pay as well as for purposes of declaratory and injunctive relief. *Bowe v. Colgate-Palmolive Co., supra*, 416 F.2d at 719-21; *cf., Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

Although the Court must be attentive to granting full relief under Title VII in appropriate cases, it is true that on ". . . issues of procedural regularity and prejudice, the 'broad aims of Title VII' provide no ready solution." *Id.*, 422 U.S. at 425. While the *Danner* result certainly seems incongruous in cases involving proof of class discrimination, the *Sprogis* result not only circumvents the Rule 23 procedure but may be unfair as well. Under *Sprogis,* if plaintiff prevails, the entire "class" benefits; but if plaintiff fails, none of the members of the "class" are bound. As then Circuit Judge Stevens pointed out in dissent in *Sprogis:*

> "A procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair." 444 F.2d at 1207

The Eighth Circuit has not specifically addressed this question, and it is unnecessary for this Court to resolve the issue at this time. It is worth noting, however, that the problems inherent in either approach evaporate if a class action is certified. Avoidance of such unjust or anomalous results is itself a cogent reason for certifying Title VII class actions in the absence of peculiar or exceptional circumstances indicating that the class action form would be improper.

Title VII class actions are best suited for treatment under Rule 23(b) (2), since disccrimination under Title VII is by nature action or inaction with respect to the entire class and since Title VII's remedies, including the award of back pay, are all equitable in nature. *See, Rich v. Martin Marietta Corp.,* 522 F.2d 333, 341 (10tn Cir. 1975) (and cases cited). While some courts hold that the remedy of back pay may be granted under a (b) (3) class, *id.*, this Court finds the better view to be that the entire Title VII case should be governed by (b) (2) and not (b) (3). *Wetzel v. Liberty Mutual Insurance Co.,* 508 F.2d

239, 252-53 (3rd Cir. 1975), *cert. denied,* 421 U.S. 1011 (1975); *Jones v. United Gas Improvement Corp.,* 68 F.R.D F.R.D. 1, 22 (E.D. Pa. 1975); *Sagers v. Yellow Freight System, Inc.,* 529 F.2d 721, 736 (5th Cir. 1976); *cf., Arkansas Education Association v. Board of Education, supra,* 446 F.2d at 768-69. This procedure accords with the purposes of Title VII, which contemplates a full inquiry into defendants' conduct and resolution of the issues of liability and remedy in a single, comprehensive proceeding. Under 23(b) (2) no members of the class may "opt out," *United States v. Allegheny-Ludlum Industries, Inc.,* 517 F.2d 826, 878 (5th Cir. 1975); *Wetzel, supra.* and the Rule 23(b) (2) procedure thus has a "superior" *res judicata* effect and protects defendants from the risk of repetitive litigation. This superior *res judicata* effect is also beneficial to the Court in its determination of appropriate back pay awards. Under Title VII, the Court must carefully articulate the reasons which justify a denial or grant of back pay. *Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 421 n.14. This exercise of discretion should be informed by a comprehensive view of the setting of the case and obviously can better be exercised in the context of the original Title VII action rather than in a series of individual suits seeking back pay. If this suit is appropriate for class treatment, it should be certified as a class action under Rule 23(b) (2).

(3) *Legal principles underlying Rule 23(a) (4,*

Despite the universally recognized principle that Title VII actions are peculiarly well suited to class treatment, it is nonetheless true that not all Title VII cases are appropriate class actions. There may be "peculiar circumstances" justifying the withholding of class certification, as when the discrimination complained of is unique to the individual, or when the named plaintiff is an inadequate class representative. *Wright v. Stone Container Corp., supra,* 524 F.2d at 1062.

The requirement of Rule 23(a) (4) is crucial to the proper application of Rule 23 as a whole. Where an entire class will be bound by the judgment in the action, placing the fate of the class in the hands of an inadequate representative is plainly repugnant to due process. *Hansberry v. Lee,* 311 U.S. 32 (1940). Effectuation of the social policies embodied in Title VII does not permit dilution of the due process rights of absent class members. Judge Godbold's admonition, stated in his special concurrence in *Johnson v. Georgia Highway Express, Inc.*, 417 1122, 1126, 1127 (5th Cir. 1969), is well taken:

> "It is tidy, convenient for the courts fearing a flood of Title VII cases, and dandy for the employees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?
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> * * *
>
> "[W]hen the problem [of due process to the employee] is multiplied many-fold, counsel, and at times the courts, are moving blithely ahead tacitly assuming all will be well for surely the plaintiff will win and manna will fall on all members of the class. It is not quite that easy."

Even in Title VII cases, the Court must carefully scrutinize the adequacy of plaintiffs' representation of the class.

"Developments in the Law: Employment Discriminaiton and Title VII of the Civil Rights Act of 1964," 84 Harv. L. Rev. 1109, 1220-21 (1971); *EEOC v. Detroit Edison Co., supra,* 515 F.2d at 311.

Rule 23(a) (4)'s requirement of fair and adequate representation embodies two essential elements: (1) plaintiffs must be represented by competent counsel who will energetically pursue the action; and (2) named plaintiffs must not possess interests which are antagonistic to the interests of the class. *Eisen v. Carlisle & Jacquelin,* 391 F.2d 555, 562 (2nd Cir. 1968). There is no doubt in this case that plaintiffs are represented by able and vigorous counsel, and the Court so finds. The issue is antagonism.

The general law of antagonism is set forth in *Redmond v. Commerce Trust Co.,* 144 F.2d 140, 151 (8th Cir. 1944), *cert. denied,* 323 U.S. 776 (1944) (hereinafter *Redmond*). Representation is inadequate,

> " . . . when there is antagonism *of interests* within the alleged class as to the subject matter. *But this antagonism must be as to the subject matter of the suit."* (Emphasis supplied.)

See also, 7 Wright & Miller, *supra,* § 1768 at 638-39 and cases cited at n.90. *Redmond* is the "leading case" on this question; it is unquestionably the law of this Circuit *Arkansas Education Association v. Board of Education, supra,* 446 F.2d at 767. (employment discrimination).

The clearest case for application of the *Redmond* rule is where the interests asserted by the class representative directly conflict with the economic interests of the class, and the rule has been uniformly followed in this situation. *Maynard, Merel & Co. v. Carcioppolo,* 51 F.R.D.

273, 277-78 (S.D. N.Y. 1970); *Schy v. Susquehanna Corp.*, 419 F.2d 1112, 1116-17 (7th Cir. 1970), *cert. denied*, 400 U.S. 826 (1970); *Shulman v. Ritzenberg*, 47 F.R.D. 202, 207-208 (D.D.C. 1969).

Decertification of class actions is not appropriate, however, when the evidence of antagonism is weak, or when the potentially conflicting interest of the representative party will not interfere with the representation of those interests as to which there is no conflict. *Knuth v. Erie-Crawford Dairy Coop. Association*, 395 F.2d 420, 428 (3rd Cir. 1968); *Mersay v. First Republic Corporation of America*, 43 F.R.D. 465, 468-71 (S.D. N.Y. 1968); *Vernon J. Rockler and Co. v. Graphic Enterprises, Inc.*, 52 F R.D. 335, 342-44 (D. Minn. 1971) (Neville, J.).

While the question of antagonism properly focuses primarily on the interests actually asserted in the lawsuit, courts have not overlooked the possible existence of ulterior motives held by the representative party which may work prejudice upon the absent class members.

> "Thus, although the Court is interested in the adequacy of representation, and not the motive for such representation, should any 'ulterior' motives of plaintiffs which are inimical to their ability to adequately represent the other shareholders become manifest, the Court is free to make appropriate adjustments." *First American Corp. v. Foster*, 51 F.R.D. 248, 250 (N.D. Ga. 1970).

In *duPont v. Wyly*, 61 F.R.D. 615, 622-24 (D. Del. 1973) (hereinafter *duPont)*, the Court ordered that the action not proceed on a class basis, in part because of plaintiff's apparent desire to "wage war" on one of the defendants.

The precedential value of this holding on the issue of motive may be questionable for two reasons. First, the question of motive was an alternative ground for decision. The other basis for decertification concerned a " . . . direct and specific conflict . . ." (a ground which alone is obviously sufficient to justify decertification), and the existence of this direct conflict was clearly the Court's primary concern. Second, the *duPont* Court doubted that *Redmond* meant what it said. In this Court's view, *Redmond* does mean what it says and represents the prevailing and correct view as to antagonism. Nonetheless, the *duPont* decision points out important considerations relating to the question of motive. The problem of antagonism is generally remedied by formation of subclasses, inviting intervention, or through the exercise of additional powers lodged in the Court by Rule 23. However, these supervisory powers are not without limitations. In assessing the adequacy of a party's representation, the Court should take account of the practical limits of its supervisory powers and should consider whether a party's motives are likely to influence his conduct of the litigation in a manner inconsistent with the interests of the class and in a manner not susceptible to effective control by the Court. If the ulterior motive is truly dominant and poses a genuine threat to class interests, the class may be decertified. *First American Corp. v. Foster, supra.*

Questions concerning Rule 23(a) (4)'s antagonism element have arisen quite frequently in class action suits involving union members or groups of employees. These cases have " . . . led to widely divergent results," and it often appears that decision has turned . . . on the factual setting of the case." *Gates v. Dalton*, 67 F.R.D. 621, 630

(E.D. N.Y. 1975). While the cases are fact specific to a large degree, the Court finds that the general principles applicable in the nonunion setting have for the most part been adhered to in the union/employee class cases.

It is clear that when an employee asserts a claim which is directly antagonistic to the economic interests of the class, a class action is inappropriate. *Phillips v. Klassen,* 502 F.2d 362, 366-67 (D.C. Cir. 1974), *cert. denied,* 419 U.S. 996 (1974); *Carroll v. American Federation of Musicians of the United States and Canada,* 372 F.2d 155 (2nd Cir. 1967); *Associated Orchestra Leaders v. Philadelphia Musical Society,* 203 F. Supp. 755, 757 (E.D. Pa. 1962); *Sheridan v. Liquor Salesmen's Union, Local 2,* 60 F.R.D. 48, 52 (S.D. N.Y. 1973); *Northwestern National Bank v. Williamson,* No. 4-73-Civ. 24 (D. Minn., May 20, 1975) (class action nonetheless maintainable in peculiar circumstances since all those opposed to asserted class interest were adequately represented by defendant). The decisions are somewhat divided as to the propriety of class treatment when the class is sharply divided over the relief which plaintiff seeks when such relief here is not directly antagonistic to the concrete interests of the class. In a number of older decisions the existence of conflicting views regarding the relief requested has led courts to order that cases not proceed as class actions. *Giordano v. Radio Corporation of America,* 183 F.2d 558, 560 (3rd Cir. 1950) (legality of expulsion from union of plaintiff and his associates). *Gray v. Reuther,* 99 F. Supp. 992 (E.D. Mich. 1951), *aff'd per curiam,* 201 F.2d 54 (6th Cir. 1952) (reinstatement in the union); *Cox v. Hutcheson,* 204 F. Supp. 442, 446-47 (S.D. Ind. 1962) (injunctive claim under Labor-Management Reporting and Disclosure Act). However, more recent decisions evidence a flexible approach toward this problem. In *Rota v. Brotherhood of Railway, Airline & S.S. Clerks,* 64 F.R.D. 699, 706 (N.D. Ill. 1974) (rescission of a dues increase), a conflict regarding the relief requested did not preclude class treatment, since the position of those union members who opposed plaintiff's claim was adequately represented by the defendant unions. The *Rota* Court relied on *Dierks v. Thompson,* 414 F.2d 453 (1st Cir. 1969), as did this Court in *Northwestern National Bank v. Williamson, supra.* The Court in *Gates v. Dalton, supra* (dues increase), followed a different approach. The Court noted that disagreements concerning the relief sought might pose a ". . . sufficient, genuine conflict . . ." such that the class should be decertified. *Id.,* 67 F.R.D. at 631. Nonetheless, the Court declined to accept at face value a membership vote retroactively approving the dues increase. Rather, the evidence of alleged antagonism was subjected to "close scrutiny," and the Court found that the record did not demonstrate a clear and genuine conflict between plaintiff and the class. This approach is entirely consistent with Judge Wisdom's analysis of an antagonism issue presented in *Rodriguez, supra,* 505 F.2d at 50-51, where the Court found that a membership vote opposing the relief plaintiff sought did not clearly reflect the actual preference of the class. The Court went on to note that even if the vote were accepted at face value, the evidence of antagonism would not justify dismissal of the class action. The trial court could have shaped the class to avoid antagonism. Alternatively, where the only antagonism related to the relief sought.

> " . . . the court could have *shaped the relief* to avoid any injustice to the dissenting class members. District courts have wide discretion in fashioning relief under Title VII, [citations omitted]. And flexibility and careful tailoring of judicial decrees in Title VII cases are the order of the day." *Id.*, 505 F.2d at 51.

Gates v. Dalton and *Rodriguez* not only indicate that seeming antagonism as to the relief sought may not be dispositive of the (a) (4) issue, these cases also demonstrate a sound and realistic assessment of the evidentiary weight to be accorded votes taken at union meetings. The percentage of the membership attending such meetings may not be large. The Court should not lightly assume that the vote of a fraction of the members reflects the views of most. *Gates v. Dalton, supra* (7/48). Moreover, the composition of those voting may not be congruent with the class, *id.*, *Rodriguez, supra.* and this fact casts further doubt on the reliability of evidence based on votes. This Court agrees that when the evidence of antagonism rests on contrary membership votes, such evidence " . . . should be nothing short of clear and convincing." *Gates v. Dalton, supra,* 67 F.R.D. at 632.

The rule that antagonism must relate to the subject matter at issue has been almost uniformly followed and has been adhered to by this Court. *Buchholtz v. Swift & Co.*, 62 F.R.D. 581, 597 (D. Minn. 1973). The mere existence of internal union dissension or factionalism does not of itself defeat maintenance of a class action. *Rota v. Brotherhood of Railway, Airline & S.S. Clerks, supra,* 64 F.R.D. at 706. In *Dawson v. Delaney*, 189 F. Supp. 416, 419 (D. Del. 1960), the membership was sharply divided as to whom should be elected officers of the Local. However, there was agreement that a trusteeship should be removed and an election held, and this was the subject matter of the lawsuit. The existence of an underlying but separate political conflict was found to be immaterial as to whether plaintiffs could represent the class. In *Sheridan v. Liquor Salesmen's Union, Local 2, supra,* plaintiffs, members of a "political clique," had raised a "furor" within the union in the course of their campaigns for elective office. Although the Court took note of this conflict and of the fact that plaintiffs had been unsuccessful in seeking office, the Court recognized that this factor ". . . is only entitled to slight weight . . . ." *Id.,* 60 F.R.D. at 54.

The Court in *Sheridan, id.,* suggested that since some members of the class were union officers or agents, a class action would be improper because:

> " . . . [n]o such person should be part of a class action where he is, in effect, complaining of his own actions, or wrongs committed against the class, to which he was a party." *Id.,* 60 F.R.D. at 55.

To the extent that union officers are merely members of the unnamed class, this difficulty is not insurmountable, for a class can be easily fashioned which excludes such persons as members and avoids any inherent conflicts of interest. More fundamentally, this Court does not believe that union officers or former officers are necessarily disenabled from serving as named representatives when the interests asserted are solely those of the union member *qua* employee and not those of the union member *qua* officer. The Court in *Lynch v. Sperry Rand Corp.,* 62 F.R.D. 78, 82 (S.D. N.Y. 1973), so held, despite a finding that the union itself was prevented from acting as a class representative because of serious potential conflicts of interest. *Cf., Vernon J. Rockler and Co. v. Graphic Enterprises, Inc., supra; Mersay v. First Republic Corporation of America, supra.*

The mere fact that members of the class may not consider it wise to sue the union is immaterial. *Gates v. Dalton, supra,* 67 F.R.D. at 631. This position is particularly important in Title VII actions, for the Eighth Circuit has recently stated that the failure of a plaintiff to join the relevant unions as defendants cast doubt on the adequacy of the class representative. *Wright v. Stone Container Corp., supra,* 524 F.2d at 1062. Unions are by nature political entities. Political differences within unions are not uncommon; nor is it uncommon for union members to oppose as disloyal the bringing of actions against the union. If these factors were sufficient to justify decertification under Rule 23(a) (4), the class representative would often be confronted with an impossible choice. Where there were divisions within the union, the representative could forego suing the union, but this decision might itself brand the representative as inadequate. Alternatively, the union could be joined as a defendant, but if generalized and undifferentiated displeasure with this course were legally sufficient to characterize the representative as inadequate, the class action again would fail. This "Catch 22" would foreclose class actions against both the union and the employer. The result would be irrational and inefficient and would severely undermine the effectiveness of Rule 23 in advancing the important social policies embodied in Title VII. This Court eschews such a course.

These Rule 23(a) (4) principles may be summarized as follows: (1) the antagonism which will defeat maintenance of a class action must relate to the subject matter in controversy, as when the representative's claim conflicts with the economic interests of the class; (2) disagreements as to the remedy do not necessarily defeat a class action, especially in Title VII cases where the Court has broad powers in fashioning appropriate remedies; (3) the mere existence of political divisions or factionalism within a union does not require class decertification; (4) disagreements as to the wisdom of a union member's suing the union are not a proper basis for decertification; (5) union officers are not necessarily disenabled from suing on behalf of union members when the interests asserted are solely the interests of members and employees; (6) evidence of antagonism based on membership votes should be carefully scrutinized and should be clear and convincing; and (7) while questions of motive are secondary, the Court should be cognizant of the limitations of its supervisory powers and should be sensitive to the possible existence of ulterior motives which might jeopardize the interests of the class.

(4) *Application of Rule 23(a)(4) principles in this case*

The Court finds that the evidence of antagonism between named plaintiffs and the class is insufficient to justify class decertification. The first source of antagonism is remote in time and, more importantly, does not concern the subject matter at issue in this case. The dissension existing between 1968 and 1970 centered on the internal structure of the union. This was a political dispute, or a series of political disputes. At best this would be entitled to "slight weight." Since the source of antagonism is remote, and since plaintiffs prevailed on most of the disputed issues, *contrast, Sheridan v. Liquor Salesmen's Union, Local 2, supra,* the Court concludes that these events are entitled to no weight whatsoever. The claim that plaintiffs demonstrably failed to protect the class in connection with the attempted raid is not persuasive. The raid itself is remote in time. The evidence that plaintiffs participated in or encouraged the raid is based on hearsay and is equivocal, and the sworn statements of both plaintiffs are to the contrary. Plaintiffs' testimony that they were required to take a "hands off" policy regarding the raid is unrebutted. Plaintiff Ambrose's activity in attempting to inform members of their rights is certainly remarkable, but if anything this course of conduct reflects an acute concern that members of the class be aware of and freely exercise their rights under the law and not an antagonism to class interests.

The second source of antagonism, an inherent conflict of interest stemming from plaintiffs' status as former union officers, is more troubling. In a sense this conflict does relate to the subject matter in controversy, *viz.,* the Local's liability for discriminating against its female members. The problem, of course, is that plaintiffs may be wearing two hats at trial: one as former union officers defending their actions, and a second as employee/members complaining of the inaction of their union. However, the extent of the conflict of interest in this situation is not clear. The conflict appears to exist only as to one defendant. As to this defendant, the conflict relates only to a two year period and relates only to the issue of liability. The question of liability spans the entire period from the enactment of Title VII to the present and, since plaintiffs allege continuing violations, will extend to the time of trial. It is not at all clear that evidence bearing on liability from 1968 to 1970 will be necessary or important for assertion of the class claim against the Local. The conflict alleged is solely an inherent one. The likelihood that plaintiffs might themselves be liable to the class is utterly remote and speculative. The record contains no evidence which would point toward such liability. *Cf., Vernon J. Rockler and Co. v. Graphic Enterprises, Inc., supra,* 52 F.R.D. at 341-42. The Court is satisfied that plaintiffs will vigorously advance the interests of the class and that the conflict of interest identified by defendants will not detract from the prosecution of the class claims. The fact that plaintiffs may be required to testify at trial in dual roles should not prejudice the class. There is no right to jury trial in Title VII cases, and thus there is no danger of jury confusion. This Court is presumptively capable of segregating that testimony which is offered on behalf of the employees from that which is elicited in defense of the union. Plaintiffs. if called to testify for the union, must answer truthfully regardless of their status as representative parties. and the Local's ability to defeat the class claim is not affected by plaintiffs' representative capacity. The Court concludes that plaintiffs' tenure as union officers does not preclude their representation of employee interests in this case. If anything, plaintiffs' prior experience in union affairs is likely to augment their adequacy as class representatives. *Buchholtz v. Swift & Co., supra,* 62 F.R.D. at 598.

The third source of antagonism, concerning plaintiffs' reaction to being removed from office and the filing of charges against the unions, does not relate to the subject matter in controversy. Defendants' argument focuses on motive, which the Court discusses below. It may be that defendants, by arguing that this action is simply a personal vendetta, also mean to imply that plaintiffs' claim is without merit. Questions running to the merits of the case are not cognizable on a motion seeking class determination, as defendants admit. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974).

The expressions of class displeasure with plaintiffs' representation are inadequate evidence of antagonism for two reasons. First, the expressions themselves are highly unreliable. The vote taken at the union meeting occurred shortly after this suit was filed. Business manager Curley did attempt to explain the lawsuit to those present, but he was uncertain whether he had even read the pleadings at that time He erroneously explained that the lawsuit involves both racial and sexual discrimination. It is not at all clear what assumptions underlay the vote. *Rodriguez, supra.* The circumstances surrounding the signing of the petitions are even more obscure. Univac has a company rule forbidding the circulation of such petitions, and it appears that the signatures were executed in a clandestine environment It is unknown who circulated the petitions or what was said to the signators.

Neither the vote nor the petitions are congruent with the class. At the December 12 meeting 101 members were present; the vote was 83-0. Forty-one of those present were male.[8] A number of the petition signators were also males. Some signatures are duplicates; it is unknown how many signators also voted at the union meeting. While the precise number of class members who had opposed this suit is unclear, the proportion is roughly the same as that in *Gates*

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[8] Ten members are recorded by first initials only; the sex of others, such as "Jan." "Jean" and "Pat," is unclear on the record. None of these is included in the Court's figure of 41.

v. Dalton, supra, where the Court found that the fractional vote was an unreliable indicator of class sentiment. This evidence of antagonism is a good deal less than clear and convincing.

The deposition testimony of plaintiffs, of business manager Curley, and of Douglas Boyce, provides no better evidence of antagonism. The plaintiffs admit that there is some opposition to their suit, especially among the union leadership, but they believe that most people support them. Mr. Boyce likewise believes that most of the women in his area support the plaintiffs. Mr. Curley, on the other hand, believes that opposition to plaintiffs is strong and widespread. All these opinions were based on hearsay, multiple hearsay and conjecture. These personal samplings of class opinion demonstrate little more than that there is some opposition to the suit among the class, the degree and nature of which is unknown.

The second difficulty with defendants' evidence of class antagonism is this: while the assumptions underlying the vote and the petitions are not known, the available evidence suggests that most objecting class members were simply upset with the fact that a union member was suing her own union. Although Mr. Curley stated that he did not know why each member voted against the suit in December 1974, he indicated that the primary issue discussed at that meeting was the fact that the Local was being sued by its own members. The minutes of that meeting reflect this concern:

> "Members questioned Pres. Curley on action that could be taken against these members (Helen Ambrose & Delores Elliot[t]) *for violating there* [*sic*] *oath*

> *as a member* & also what action could be taken to show that they do not support this suit.
>
> "Pres. Curley stated that the members should take any action on their own. The local is a defendant & should not try to influence the members." (Emphasis supplied.)

A great many of the petitions refer only to the fact that the Local is being sued and indicate that the signers do not wish to be party to such action. To the extent that defendants' evidence of antagonism reflects the view of class members that it is disloyal and improper for a union member to sue her own union, the antagonism is of a type which can have no bearing on certification of a Title VII class.

It is unclear to what degree, if any, the alleged class antagonism extends beyond this generalized displeasure. Moreover, there is no evidence that the class believes that the claims advanced here conflict with the concrete interests of the class. There is no evidence that the class is opposed even to the relief sought, except perhaps insofar as relief may involve the Local. At best, it appears that certain class members may be opposed to the named plaintiffs acting as representative parties. Since this antagonism seems to stem from political differences and from a feeling of disloyalty and has nothing to do with the subject matter of this lawsuit or the interests of the class in this lawsuit, and since the evidence of even this antagonism is less that clear, the fourth source of antagonism is not a basis for class decertification.

The fifth source of conflict of interest, like the third, poses the problem of motive. It is not unlikely that plaintiffs will participate in the political affairs of their union, and it is not inconceivable that plaintiffs will attempt to pursue this action so as to advance their political purposes. The Court's supervisory powers are not perfect, and this is particularly true in relation to plaintiffs' acceptance or rejection of settlement offers which may or may not be beneficial to the class. *duPont, supra.* Additionally, even if plaintiffs *actually* possess no dominant ulterior motives, there is a danger that the class itself will *perceive* this lawsuit as merely a vehicle for advancing plaintiffs' personal and political goals. Such a perception could threaten plaintiffs' ability to pursue class interests, for suspicion on the part of the class might foreclose access to sources of proof. For example, if class members feel that this action is alien to them, they might refuse to provide the Court with the information necessary to determine appropriate back pay awards, relinquishing rights which might have been asserted were the class representative more personally compatible with the class.

The problem of ulterior motives, and of class perception of motives, does not warrant decertification at this time. As noted above, the evidence of present class antagonism or suspicion is far from clear. Since the Court finds that some notice to the class will be necessary under Rule 23(d) (2), *ante,* it will be possible at that time to determine the degree and nature of antagonism and to judge the appropriateness of intervention by additional class members, whose presence as named parties could obviate the danger of perceived antagonistic motives.

The supervisory powers vested in the Court are not all-encompassing. However, in the task of protecting the class from conflicting interests or ulterior motives, the Court does not stand alone. Counsel for the class are officers of the Court. When attorneys undertake representation of a class, each member of the class becomes a client. The representative party's attorney thus owes a duty of loyalty, and a duty of zealous representation not only to the named party but to all absent parties as well. This Court is of the view that if the named parties in this case attempt to manipulate the conduct of this action so as to further their solely personal interests, or if the representative parties take any action which is inimical to class interests or poses a danger of potential conflict of interest with the class, counsel's ethical obligations to their class clients and to the Court would require corrective action and disclosure to the Court.[3] Such responsible action by counsel is essential to make Rule 23 function efficiently and fairly. In the Court's view, the strict *Redmond* rule is premised on the belief that courts can rely on counsel to prevent ulterior motives or other considerations not bearing on the subject matter in controversy from affecting the prosecution of common legal interests. The teaching of *Redmond* suggests that a class action should not be decertified because of concerns bearing on ulterior motives except in exceptional cases, as where the ulterior motive is so clearly dominant that it is doubtful that the attorney for the class will be able to control the named party, *cf.*, *duPont, supra,* or where counsel has demonstrably failed to exercise effective control

To date the common interests of the class have been diligently pursued by the named parties and their attorneys.

---

[3] Plaintiffs could have sued in their individual capacities, and had they done so they would have been entitled to pursue their legal interests in a manner consonant with their ulterior motives, if any. In representing a class, however, the named parties and their counsel are required to look only to the common legal interests of the class.

The problem of motive looks to the future; the danger is speculative. The Court cannot say that its supervisory powers under Rule 23 will be inadequate to cope with any problems of ulterior motive which may develop and as to which the Court will be appropriately appraised by counsel for the class.

In sum, in this Title VII action plaintiffs assert legal interests which are common to the entire class and seek relief which will inure to the benefit of the entire class. The Court perceives no concrete or direct conflict between plaintiffs' interest under Title VII and the interests of class members. Plaintiffs and their counsel have vigorously represented the class thus far, and the Court is satisfied that they will continue to do so. The conflicts of interest identified by defendants are tangential and are almost entirely immaterial to the issues posed in this case. Heretofore, these conflicts have not prejudiced class interests. Should genuine conflict arise in the future, the Court, being advised by counsel for the class, may remove any antagonism or, if necessary, decertify the class.

III. *CERTIFICATION OF APPROPRIATE CLASS, NOTICE, AND PARTIES.*

Plaintiffs satisfy the prerequisites of Rule 23(a), and this action shall be certified as a class action under Rule 23(b) (2). Such certification is conditional. Since broad injunctive and declaratory relief is often appropriate in Title VII cases, a class including both former and future employees and union members is appropriate. The Court believes that including within the class those who "would have" become employees is unnecessary for granting whatever relief may be necessary and would constitute an overly vague class definition. The class shall be defined as former, present and future employee/union members.

Since this action shall proceed as a class action, it is appropriate and consistent with the Court's duties under Rule 23 to provide the parties with some direction. The Court finds that some notice to class members who may be entitled to back pay should be provided under Rule 23(d) (2). This conclusion rests on two grounds. First, it appears that the award of back pay may turn on ". . . the equities of individual cases . . . ." *Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 413. The determination of back pay awards should be made on an individualized basis. *Johnson v. Goodyear Tire and Rubber Co.,* 491 F.2d 1364 (5th Cir. 1974), and such a decision should follow notice directed to the class. *Williams v. Local No. 19, Sheet Metal Workers International Association,* 59 F.R.D. 49, 56 (E.D. Pa. 1973). While " . . . experience teaches that such notice may come late in the litigation . .." *United States v. Allegheny-Ludlum Industries, Inc., supra,* 517 F.2d at 878, a second consideration indicates that earlier notice is appropriate in the present case. Although the evidence of antagonism in this case is not of a type which justifies class decertification, there are legitmate grounds for concern that some, and perhaps many, class members may be opposed to the conduct of this suit by the named parties and that such members of the class might abandon their potential claims for back pay simply because of the identity of the representative parties. Although the Court is powerless to prevent class members from foregoing the assertion of their legal rights, reasonable steps should be taken to determine the degree and nature of class antagonism so that measures may be fashioned for reducing such antagonism. The (d) (2) notice procedure is an appropriate mechanism for exploring problems of antagonism, reducing confusion within the class, and formulating necessary orders. 7 and 7A, Wright & Miller, *supra,* § 1768 at 651, § 1793 at 209-210 The parties should proceed with discovery not only as to the merits but also for the purpose of defining an appropriate back pay class and determining the names and current mailing addresses of such class members. When such discovery is complete, the parties should submit to the Court proposed notices. At the least, the notices should concisely explain the nature of this lawsuit, explain that all persons will be bound by the judgment in this case, explain that the recipients may at some future date be entitled to an award of back pay, enumerate those types of evidence which the employees should retain for proof of their back pay claims, and elicit responses on the issue of antagonism. These responses should seek information as to the following: (1) whether the recipient is opposed to this lawsuit; (2) if there is opposition, what the source of that opposition is; (3) whether the recipient would desire to intervene in this case either with her own counsel or with counsel presently representing the class; and (4) if there is opposition and if the recipient does not wish to intervene, whether the recipient would wish to see other class members intervene, and, if so, whom the recipient feels would be appropriate intervenors. The cost of such notice must be borne by the class representatives. *Eisen v. Carlisle & Jacquelin, supra,* 417 U.S. at 177-79.

The Court notes that the EEOC "right to sue" letter attached to the complaint appears to name only the Local as a respondent. The caption is somewhat ambiguous, and it is not inconceivable that the International as well as the Local was charged before the EEOC. However, if only the Local was a respondent, there may be an impediment in this case to the granting of complete relief. Plaintiffs complain of discrimination on the part of all three defendants. Where unions are guilty of discrimination, they must be joined as defendants. *Gilmore v. Kansas City Terminal Railway Co., supra,* 509 F.2d at 52-53. When non-joinder threatens to frustrate a Court's exercise of Title VII remedial powers, the Court may act *sua sponte* to order the unions joined, as did the Eighth Circuit in *Gilmore.* However, it may be necessary for administrative charges to have been filed with and processed by the EEOC before a proper joinder may be effectuated. *Norman v. Missouri Pacific Railroad,* 414 F.2d 73, 84-85 (8th Cir. 1969); 42 U.S.C. § 2000e-5(f(1) (". . . a civil action may be brought against the respondent named in the charge . . ."). If plaintiffs have not heretofore brought a charge against the International before the EEOC, they should do so immediately.

IT IS ORDERED:

1. That defendants' motions that this case not proceed as a class action are granted as to plaintiffs' claims arising under the Back Pay Act and as to plaintiffs' claims for breach of the duty of fair representation and for breach of contract. Said motions are denied as to plaintiffs' Title VII claims.

2. That plaintiffs' motion for class certification is denied as to plaintiffs' Back Pay Act, breach of duty of fair representation and breach of contract claims. Said motion is granted as to plaintiffs' Title VII claims.

3. That the Title VII class is hereby conditionally certified and is defined at this time to include former, present and future female employees of defendant Univac employed at its plants in and near St. Paul, Minnesota, and who are, have been, or will be members of defendants Local and International, for the period commencing on July 2, 1965, and continuing to the date of trial.

4. That denial of plaintiffs' motion for certification of a class action as to the duty of fair representation/breach of contract claims is conditional. Denial of said motion with respect to the Back Pay Act claims is not conditional.

5. That the parties, in addition to proceeding with discovery on the merits, also pursue such discovery as will identify the names and current mailing addresses of class members who may be entitled to an award of back pay under Title VII.

6. That upon the completion of such discovery, the parties submit to the Court proposed forms of notice to be mailed to members of the class pursuant to Rule 23(d) (2).

May 27, 1976.

/s/ Earl R. Larson
United States District Judge

NOTICE OF CLASS ACTION
PLEASE READ THIS CAREFULLY

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose and all persons similarly situated,

Plaintiffs,

vs

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

No. 4-74 Civil 627

TO: PLAINTIFFS AND CLASS MEMBERS

There is pending in the United States District Court for the District of Minnesota, Fourth Division, a class action lawsuit against Sperry Rand Corporation, the International Brotherhood of Electrical Workers (IBEW), and Local Union No. 2047 of the IBEW, alleging that these defendants violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*.

This notice is directed to you because you may be affected by this litigation. The notice is not to be understood as an expression of opinion by this Court as to the merits of any of the claims or defenses asserted. Rather it is given solely for the purpose of informing you of the pendency of this action so that you may decide what steps you wish to take in regard to it.

The complaint in this lawsuit alleges that Sperry Rand-Univac, the IBEW and Local Union 2047 discriminate, and have discriminated in the past, in a number of ways against women at Univac's Twin Cities locations. The lawsuit seeks an Order from the Court forbidding the defendants from further discrimination and for an Order rectifying past discrimination to include the award of back pay and money damages.

The defendants have denied the allegations contained in the complaint and further deny any liability.

On May 27, 1976, the Court determined that plaintiffs Delores Elliott and Helen Ambrose were proper representatives of a class consisting of:

> "Those present and future female employees of defendant Univac employed at its plants in and near St. Paul, Minnesota, and who are or will be members of defendants Local and International, up until the date of trial; and those former female employees who were employed by defendant Univac at its plants in and near St. Paul, Minnesota, and who were members of defendants Local and International, on September 4, 1972, or thereafter."

All persons who fit within the above class definition and who do not request to be excluded from this action will be deemed members of the class, will be represented by the named plaintiffs in this action and will be bound by the judgment of this Court in the action, whether favorable or unfavorable to the class. In this regard, a questionnaire has been attached to this Notice. *Please read this* *questionnaire and return it to the Clerk of Court indicating appropriate answers in the spaces provided.*

It may be necessary during the course of this litigation to provide the Court with certain information about your employment with Univac. Therefore, you should attempt to make a record or keep a record or other factual support for proof of (a) the job classification(s) you held during your employment with Univac; (b) the number of times and the dates on which you may have applied for other positions at Univac; (c) the dates of any changes in your position or job classification at Univac; (d) the date of your hiring and, if applicable, the date of your termination.

Please address any communications or inquiries you may have concerning the conduct of this action to the Clerk of Court, United States District Court, District of Minnesota, Fourth Division, P.O. Box No. 2230 Loop Station, Minneapolis, Minnesota 55402.

/s/ Earl R. Larson
EARL R. LARSON
UNITED STATES SENIOR DISTRICT JUDGE

Clerk of Court
United States District Court
P.O. Box No. 2230 Loop Station
Minneapolis, Minnesota 55402

Re: Delores Elliott, Helen Ambrose, and all other persons similarly situated v. Sperry Rand Corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047, I.B.E.W. No. 4-74 Civil 627.

79
Ambrose Helen M. 000003271
3528-27th Ave. S.
Mpls. Minn. 55406

BEFORE COMPLETING THIS QUESTIONNAIRE READ THE NOTICE ATTACHED.

1. Do you favor or oppose this lawsuit being brought on your behalf by Delores Elliott and Helen Ambrose?

   (Mark X indicating your choice.)

   I favor this lawsuit————
   I oppose this lawsuit————————

2. If you answered "I oppose" to question (1) above, please set forth below the reason for your opposition.

3. Do you wish to participate as a member of the class in this lawsuit and be represented by the attorneys for the class?

   Yes ———— No ————

4. Do you wish to participate in this lawsuit with your own attorney?

   Yes ———— No ————

5. If you do not wish to participate but desire that others participate, please specify the names of these other individuals.

EXCLUSION REQUEST

(COMPLETE THIS PORTION *ONLY* IF YOU DESIRE TO BE EXCLUDED FROM THE CLASS IN THIS LITIGATION.)

6. I acknowledge receipt of the notice attached and wish to be excluded from this litigation.

Date: ————, 1979.

————————

AFTER YOU HAVE ANSWERED THE QUESTIONS ASKED ABOVE, PLEASE PROVIDE THE FOLLOWING INFORMATION AND RETURN THIS QUESTIONNAIRE BY AUGUST 6, 1979.

Date: ————, 1979.

Name: ————

Address: ————

————————

QUESTION NO. 4: How much of any money damages awarded to Delores Elliott and Helen Ambrose on behalf of the class might the IBEW and Local 2047 be responsible for?

ANSWER: This would be determined by the Court after hearing all the evidence. Until all the evidence is heard, it is difficult to say. It is possible, however, that the International and Local Unions might be held responsible for a portion of any back pay and money damages awarded.

QUESTION NO. 5: How would the IBEW and Local 2047 pay any back pay of money damages for which they are held responsible?

ANSWER: The IBEW would attempt to pay its share out of its own funds as available. Local 2047 would attempt to pay its share out of its own funds and if its own funds on hand were insufficient, it is possible that the Local Union could, by secret vote of its membership, assess all of its members to cover its share.

QUESTION NO. 6: How will this case affect me as an employee of Sperry Rand and as a present or past member of the International Union and the Local Union?

ANSWER: If the plaintiffs establish sex discrimination, the Court has the power and the authority to issue an Order forbidding further discrimination and to award back pay and money damages. You would be covered by the Court's Order forbidding further discrimination. If you are determined to have been discriminated against, you may also be entitled to back pay and money damages.

At the same time, as a member of the Local Union, it is possible that you might be assessed some amount of money, as a result of a secret vote by the Union membership, to help the Local Union pay its share of any back pay or money damages for which it is held responsible.

Regardless of the outcome of this lawsuit, neither Sperry Rand nor the Local Union has any right to fire, demote or otherwise terminate your employment with the Company or your membership in the Local Union as a result of any activity or conduct on your part in this lawsuit.

If you have any further questions or other communications pertaining to the matters discussed above, please address those questions in writing to:

Clerk of Court, United States District Court
P.O. Box 2230 Loop Station
Minneapolis, Minnesota 55402

Please be sure to include your name and address in any correspondence with the Clerk of Court.

SETTLEMENT NOTICE

A copy of the Stipulation of Settlement and other papers relating to this lawsuit are on file with the Clerk of the United States District Court, 110 South Fourth Street, Minneapolis, Minnesota. You may inspect these documents at the Clerk's office between 8:30 am. and 5:00 p.m., Monday through Friday.

The Court must approve this settlement. The Court has scheduled a hearing to be held on July 27, 1981, at 9:00 a.m. at the United States Courthouse in Minneapolis to determine whether the proposed settlement is fair, reasonable and adequate and should be approved by the Court.

You are entitled to object to all or any part of the settlement and to have your objection ruled upon by the Court. IF YOU WISH TO OBJECT TO THE APPROVAL OF THIS SETTLEMENT, YOU MAY APPEAR AT THE HEARING AND SHOW CAUSE, IF ANY, AS TO WHY THE SETTLEMENT SHOULD NOT BE APPROVED AS FAIR, REASONABLE, AND ADEQUATE AND WHY THIS ACTION SHOULD NOT BE DISMISSED ON THE MERITS AND WITH PREJUDICE AS TO DEFENDANTS.

If you wish to object to the settlement, your objection must be submitted in writing to the Court and must be received by the Court no later than July 20, 1981. Your objection should be mailed to:

Clerk of United States District Court
110 South Fourth Street
Minneapolis, Minnesota 55401

with copies mailed to:

J. Richard Bland, Esq
Bradley M. Jones, Esq
2250 IDS Center
Minneapolis, Minnesota 55402

David S. Doty, Esq.
Sally A. Johnson, Esq.
4344 IDS Center
Minneapolis, Minnesota 55402

Hyman Edelman, Esq.
William Z. Pentelovitch
1800 Midwest Plaza
Minneapolis, Minnesota 55402

James T. Hansing, Esq.
1208 Plymouth Building
Minneapolis, Minnesota 55402

You may consult and retain your own legal counsel if you desire. You may also address questions to:

J. Richard Bland, Esq. or
Bradley M. Jones, Esq.
2250 IDS Center
Minneapolis, Minnesota 55402
Telephone: (612) 338-0661

If you fail to object in the manner prescribed herein, you will have waived your objection, you will be bound by the Court's determination, and you will be foreclosed forever from raising an objection without special permission of the Court.

In the event that the hearing on this settlement does not resolve all questions or objections on July 27, 1981, the Court may order further proceedings to be held No further notice will be sent to you regarding any such continuations of the hearing or related proceedings unless ordered by the Court.

BY THE COURT

/s/ Earl L. Larson
United States District Court Judge

Dated: May 21, 1981

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA
670 U. S. COURT HOUSE
MINNEAPOLIS, MINNESOTA 55401

March 27, 1985

CHAMBERS OF
EARL R. LARSON
Senior Judge

Mr. Robert D. St. Vrain,
Clerk, U. S. Court of Appeals
U. S. Courthouse and Customs House
1114 Market Street
St. Louis, MO. 63101

Re: Elliott, et al v. Sperry Rand, et al
4-74 Civil 627
#84-5183

Dear Mr. St. Vrain:

A response to the Ambrose letters of March 11 and March 17, 1985 should perhaps not be necessary.

Ms Ambrose states that the law firm of Lindquist & Vennum was identified at the start of the law suit as counsel for Teamsters Local Union No. 970. The law suit was filed in 1974.

I became a Judge in August 1961 and at that time completely severed my relationship with my former firm. I enforced a three year deadline during which time I took no cases involving my old firm. The firm continued as Lindquist, et al and in 1968 merged with Vennum et al and became Lindquist & Vennum. None of the Lindquist et al or Lindquist & Vennum lawyers who appeared before me after 1964 were in the Larson et al firm in 1961 or prior thereto.

I have no knowledge as to whether or at what point in time Lindquist & Vennum might have represented Local 970.

Ms. Ambrose refers to a statement in a Sperry Rand brief that I came to the bench with an extensive labor background. I practiced little, if any, labor law. Counsel for Sperry Rand may have been thinking of Leonard Lindquist with whom I started the firm in 1946. Mr. Lindquist has an extensive background in labor arbitration. Since 1961 I have been involved in a number of cases and disputes involving labor and management. This is true of all Judges. I feel that I have followed the law in the resolution of these disputes.

In the second letter Ms. Ambrose refers to two law clerks who later became members of the Hvass, et al law firm. Once a law clerk tells me of a decision to join a certain law firm I no longer permit the law clerk to do any work involving that law firm. For a period of three years I do not take any cases in which a former law clerk will participate.

Since 1970 Ms. Ambrose has been engaged in a series of attacks directed to her Local Union, the International Union, her employer, three of her law firms and now myself The Court of Appeals is the next likely target.

Sincerely,

/s/ Earl R. Larson
Earl R. Larson
Senior, U. S. District Judge

ERL/jcp
cc: Ms Helen M. Ambrose
3528 27th Avenue So.
Minneapolis, MN. 55406

LAW OFFICES
MESHBESHER, SINGER & SPENCE, LTD.
1616 PARK AVENUE
MINNEAPOLIS, MINNESOTA 55404
(612) 339-9121

December 2, 1981

Ms. Helen M. Ambrose
3528 27th Avenue South
Minneapolis, MN 55406

RE: 45-(81-82)

Dear Ms. Ambrose:

I have enclosed a copy of a Hennepin County Bar Association Ethics Committee Rules, as you requested.

Committee members assigned to a particular case are asked to conduct an investigation, which involves receiving written materials from the parties and doing whatever follow up is necessary. The limitations on the investigation are set forth in the enclosed rules. I have questioned you and Ms. Elliott over the telephone to save time, but solicit all the information you can give me, in either written or verbal form

I have sent the respondent attorney's written submissions, and have summarized any additional oral responses that they have made.

After my presentation to the committee which first screens these matters, it was decided not to dismiss the case and to continue the investigation. I have received and reviewed the additional materials that you sent me. In addition, I contacted Charles Hvass, Sr., who gave me more information about his firm's representation of the Teamsters. They did some work similar to the machinists and were initially concerned that the same kind of lawsuit might be made against them. Later, they concluded that there was no such possibility and told Hvass that they were comfortable with his representation of you.

I also asked Hvass about his representation of Doty's firm. Apparently, the representation had been concluded by the time he entered your case. He represented Doty's firm in a fee award result which was appealed to the Regional Federal Appeals Court. Hvass did not do the written work, but argued the case in St. Louis. He received a fee which had been set before he entered your case.

The investigation will continue with a second review before an Ethics Committee panel.

Your truly,

/s/ Carol Grant
Carol Grant
CG:kc
Enclosure
cc Ms. Delores Elliott

HANDWRITTEN AFFIDAVIT OF CLASS MEMBER JENNIE HODDER

Ms. Carol S. Grant, Atty.
1616 Park Avenue
Mpls., Minn.

Dear Ms Grant:

I, Jennie Hodder wish to give an affidavit that I was to have been called as a witness in the case No. 4-74 Civil 627.

My testimony was to be directed to the fact that I performed the same work as a Teamster Mechanical Inspector, as well as the same work in the I.B.E.W. General Inspector class, and that I was paid at a lesser rate of pay.

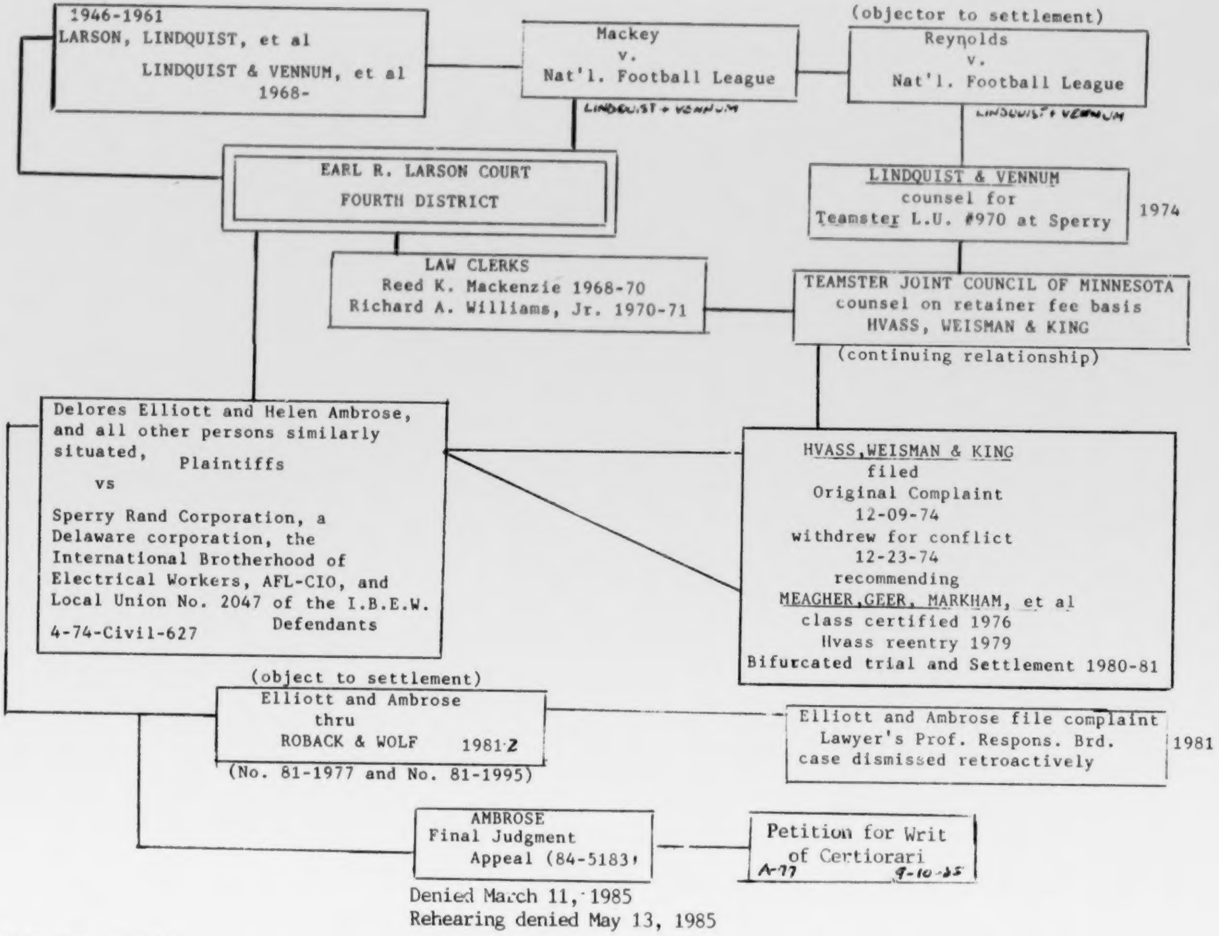
I wish to make it clear to you, that I had made that fact plain to Mr. Bland during the trial. I attended the trial daily except for the first week. Mr. Bland was aware of the intermingling of the Inspection classes these complaints were made to him during coffee and lunch breaks at trial. Mr. Bland failed to read, or acknowledge my written objection, at that it was directed to the fact I performed the same work as a Teamster Mechanical Inspector, and that I received a lesser rate of pay.

Sincerely,

Ms. Jennie Hodder
2436 Martin Way
White Bear Lake, Mn. 55110

On 13th day of March 1982
Notarized

INTERCONNECTING RELATIONSHIPS & PROGRESSION OF THE SPERRY/ELLIOTT CASE


1946-1961
LARSON, LINDQUIST, et al
LINDQUIST & VENNUM, et al 1968-
Mackey v. Nat'l. Football League
LINDQUIST + VENNUM
(objector to settlement)
Reynolds v. Nat'l. Football League
LINDQUIST + VENNUM
EARL R. LARSON COURT
FOURTH DISTRICT
LINDQUIST & VENNUM counsel for Teamster L.U. #970 at Sperry
1974
LAW CLERKS
Reed K. Mackenzie 1968-70
Richard A. Williams, Jr. 1970-71
TEAMSTER JOINT COUNCIL OF MINNESOTA
counsel on retainer fee basis
HVASS, WEISMAN & KING
(continuing relationship)
Delores Elliott and Helen Ambrose, and all other persons similarly situated, Plaintiffs
vs
Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the I.B.E.W. Defendants
4-74-Civil-627
HVASS, WEISMAN & KING
filed
Original Complaint
12-09-74
withdrew for conflict
12-23-74
recommending
MEAGHER, GEER, MARKHAM, et al
class certified 1976
Hvass reentry 1979
Bifurcated trial and Settlement 1980-81
(object to settlement)
Elliott and Ambrose
thru
ROBACK & WOLF 1981-2
(No. 81-1977 and No. 81-1995)
Elliott and Ambrose file complaint
Lawyer's Prof. Respons. Brd.
case dismissed retroactively
1981
AMBROSE
Final Judgment
Appeal (84-5183)
Denied March 11, 1985
Rehearing denied May 13, 1985
Petition for Writ of Certiorari
A-77
9-10-85

H.M. Ambrose-1985

ETHICS COMM. LAWYER
CAROL GRANT NOV. 17, 1981
FINDINGS AS TO HVASS CONFLICTS

November 17, 1981

The findings of Carol Grant of the Ethics Committee after initial investigation was predicated upon Disc. Rules and Cannons as follows;

DR 7-101 (a) (3), EC. 7-7, DR 5-105 EC. 5-19

"In light of these rules, I evaluate complainants' claims as follows:

1. Complainants acquiesced in Williams' presence during trial. They knew he was from the Hvass law firm. I, therefore, would dismiss this complaint.
2. Complainants apparently concede or at least can't dispute that they were in error about the sutstitution of Charles Hvass for Richard Bland during settlement negotiations.
3. Complainants have no proof to dispute the claim of Charles Hvass that he was asked to participate by his own associate Williams I do think representation of Doty should have caused Mr. Hvass to discuss the matter with complainants and withdraw upon request, per EC 5-19 and DR 5-105 (c). Thus, I believe there has been a violation of the disciplinary rules.
4. The Teamsters' conflict of interest was remote or non-existent and arguably falls outside the conflict of interest disclosure requirement. In any event, they objected, but it appears the objection was more in

the form of a question to Bland. It would have been desirable for Bland to relay this information to Hvass, so that Hvass could withdraw, but given the remote or non-existent nature of the conflict and weak objection, I recommend that this complaint be dismissed.

5. It appears that complainants expressed their desire to attempt (attend) settlement conferences but acquiesced in the strong recommendation that they not do so. Again, it might have been desirable for the lawyers to let plaintiffs attend, but I don't think the situation warrants discipline.

6. The lawyers may have been unduly harsh in stating their case for the proposed settlement, but I don't think they overstepped the bounds of propriety. The settlement was approved by Judge Earl Larson and apparently the proper procedures were followed in obtaining class acquiescence.

7. The attorneys apparently did obtain the job packets and determined they weren't too useful; therefore I dismiss this complaint."

JULY 30, 1981. FAIRNESS (FEE) HEARING HVASS COMFLICTS

EXPLANATIONS BY BLAND, WILLIAMS AND HANSING (L.U. 2047 IBEW ATT'Y)

[188] THE COURT: Ms. Roback or Ms. Wolf—

MS. ROBACK: Your Honor, it is my understanding we are discussing the petition of the class attorneys for fees and costs, and just making response to that petition we are not objecting to the Meagher, Geer firm's fees and costs, but would like to know on what hourly basis the firm is billing these attorneys' fees.

Secondly, we do object to the firm of Hvass, Weisman & King receiving attorneys' fees when they have not specified to the Court the time period these fees were incurred and also, due to the fact they did withdraw from the case before the Court due to conflict of interest and re-entered the case without the consent of the named plaintiffs or other class members. I would like to challenge the propriety of the award of attorneys' fees to this firm and to note to the Court that in the settlement itself and in the notice to the class, it is not noted that the Hvass firm is to receive the fees.

Also, where it lists the attorneys on the notice itself which did go to the class, there is no mention of the Hvass firm on this notice.

We will address our motion for attorneys' fees after any other objections have been made to Mr. Bland's motion. Thank you.

[189] THE COURT: Mr. Bland or Mr. Williams, as I remember there was this earlier conflict and you came back into the picture because the conflict no longer continued?

MR. WILLIAMS: Well, Your Honor, I will speak to that issue. What happened on the case was we never felt, actually, that there was a conflict of interest. Where the issue arose was an apparent conflict of interest which was raised by a Teamster organization which our office did not represent. However, we did represent Joint Council 32, the unbrella organization of which that particular

Teamster Local was a participant. When that Local raised the issue because they represented people on the mecahnical side of that same operation—they had a small bargaining unit—we advised the class representatives of the fact that this objection had been raised and since these people did contribute in part on a per capita to a retainer that our firm received from the Joint Council, and since the Joint Council, or this one Local was objecting, we advised them that under the circumstances we probably felt we might have to withdraw from the case, simply because of the appearance. We did not feel there was a conflict but there was an appearance of a conflict and it was our client that was objecting.

[190] It was at that time that we made arrangements to meet with other counsel on the case to see if they were satisfied with a particular firm taking over the matter. What happened was at some time later the Joint Council advised they did not feel this was a conflict of the nature that should keep us from participating in the case. It was at that time that we once again became reinvolved in the case with the Meagher, Geer office to help participate in the prosecution of the lawsuit. We came in after the issue went up to the Eighth Circuit on the issue of class certification and returned to this Court for trial.

That is the factual framework under which the withdrawal took place. I don't think it is fair to say there was a conflict of interest, and I know because I was present at some of the discussions that took place at that time. Mr. Hvass advised the class representatives—in fact, very carefully advised him that he did not view it as a conflict but there was the potential appearance of a conflict and the party raising it was a client of the office. That was the reason we left the case at that time.

However, as I pointed out, it was the party who raised the issue which later said, "No, don't worry [191] about it. You may participate in the case." The party having the right to raise the issue of conflict said "We don't view it as a conflict of interest."

THE COURT: Do you want to speak to your request, Ms. Roback?

MS. ROBACK: Our request for attorneys' fees?

THE COURT: Yes.

MR. WOLF: I didn't know if you wanted a response to what Mr. Williams said.

THE COURT: You may respond to what Mr. Williams said.

MS. WOLF: First of all, if there was enough of a conflict or they believed there was enough of a conflict to excuse themselves from the case initially, our clients still feel that they need to have a justification for why the Hvass firm re-entered the case and why until they appeared at the first day of trial, they were not aware that the Hvass firm had evidently been rehired.

Our clients do not object to any payments to the Hvass firm in the drafting of the Complaint in the initial lawsuit. They had retained them, they were pleased with that counsel. The question we have is from the documents submitted thus far by Meagher, Geer and the Hvass firm it is impossible to see—there is no [192] breakdown of hours on which charges are, let's say pre-trial and which are during trial or post trial. Those are the fees that our clients object to.

THE COURT: I believe everyone knows that Mr. Williams was here for much of the trial. He examined some of the witnesses as I recall and participated in cross-examination.

MS. WOLF: Our clients are not challenging the fact that Mr. Williams was here at trial. They saw him every day. The issue is, Your Honor, they feel that his representation or desire to represent them as part of class counsel was unauthorized and was without their knowledge. They don't understand how it was that he came to re-enter the lawsuit. Therefore, until that is explained we would like that portion of the fees to the Hvass firm to be withheld.

In other words, the first thing I am asking for is a breakdown of the fees that the Hvass firm is asking for so that we are able to distinguish the portion of fees before the Hvass firm declared a conflict of interest, approximately December, 1974. That portion of the fees we have no objection to.

The second issue is the portion of fees that occurred after the Hvass firm re-entered the case and proceeded to trial in approximately 1979. It is that [193] portion of the fees where our clients feel the issue needs to be clarified—how it was that the Hvass firm came to be re-involved. It is that portion of the fees to which they object.

THE COURT: Mr. Williams just explained that Ms. Elliott hired them in the first place. I know they are hiring more and more law firms. They hired you and Ms. Roback and I suspect they will be hiring more law firms.

MS. WOLF: Your Honor, I don't think that is the issue at all. The issue is not how many law firms Ambrose and Elliott have hired, Your Honor. They deserve to be represented as competently as possible.

THE COURT: My guess is they are going to be dissatisfied with you and Ms. Roback and will be back asking for more representation in this court.

MR. WOLF: I would like it on the record that we believe and our clients believe that is absolutely irrelevant to the issue.

MR. HANSING: Could I make a few remarks with reference to what Mr. Williams said.

I have been the attorney for Local Union 2047 of I.B.E.W. since about 1973 when I left the NLRB, and this suit was commenced in 1974. Some time after the suit was commenced it was brought to the attention of [194] the Local Union that the Hvass firm which was representing the plaintiffs at that time was the attorney for Teamsters Joint Council 32, which as Mr. Williams stated is the Minnesota unbrella organization for all Teamster Local affiliates in the State of Minnesota. One of the Teamster Local Unions affiliated with Joint Council 32, Teamster Local 970, had a small bargaining unit at Sperry Univac, and the bargaining unit consists of experimental, prototype people in an area, if I recall correctly, which was adjacent to the refurbishing area, and from time to time jurisdictional disputes erupted between Local Union 2047 and the Teamsters Local.

As you know, Local 2047 is a production and maintenance employee union, and Local 970 represents the experimental shop employees. If I recall correctly, Mr. Curley became indignant over the fact that the Hvass firm which represented the Teamsters was suing another Local Union which was not affiliated with the Teamsters. I think at some time maybe that concern was transmitted to either 970 or the Teamsters. I was not a party to it but that is my understanding in talking to Mr. Curley. I think at that point the Hvass, Weisman firm because of their sence of commitment or obligation to the Joint Council, not to 970, desired to step aside from the case. At that time Local 970 was represented by Leonard [195] Lindquist's firm, Lindquist & Vennum. The Hvass, Weisman firm was not representing 970 at that time.

I can even give testimony that Hvass, Weisman has never represented 970 until recently. Lindquist & Vennum has been representing them, and it is my understanding that Robins, Davins & Lyons now represents 970.

MR. WILLIAMS: I would just like to clarify one thing, Your Honor. I think the facts that Mr. Hansing relates are accurate. I report to the Court that I was present when Mr. Hvass met with the named plaintiffs and explained to them the fact we didn't believe there was a conflict but we were faced with a claimed appearance of conflict by another client of the office, and under those circumstances with another client in the office making a claim of an apparent conflict of interest, we felt it was the responsible thing at that point in time, to try to get other counsel to continue the case. I want to emphasize that at a later point in time the very party raising the issue said, "We don't believe there is conflict of interest and have no objection to you participating in the case." That is why we became reinvolved in the case.

I don't want the Court to have a feeling there was any feeling in our office that there was an actual conflict of interest or that we were incapable in any way [196] representing the named plaintiffs in the case.

MR. HANSING: One other point, the class, Your Honor, includes all females who have been, are, or will be employed by Sperry Univac and who are members of the Local Union 2047, I.B.E.W. That class definition never at any time included any other employees, including employees of the Teamster affiliate. So people in that experimental prototype shop were never part of the class. Noone ever sought to include them. As I perceive it they have never been involved indirectly or directly in the case in any manner.

MR. BLAND: If I can just add a couple of comments also I don't quite understand why this issue is being raised and perhaps Ms. Wolf or Ms. Roback can clarify this, but I don't think they are claiming that because of Mr. Williams' involvement, not only in the trial of this case but in a great deal of the pre-trial discovery in this case, depositions of Union personnel, all of which was known to both Delores Elliott and Helen Ambrose. We had meetings with them prior to the trial. They fully knew the involvement of Mr. Williams and the Hvass firm long before the trial of this case was started. Unless their claims is that somehow this class and the named plaintiffs got lesser representation because of the entry of the Hvass firm than they got from the Meagher, [197] Geer firm, then I don't see why they are raising this issue.

The Hvass firm got in for two very good reasons. It takes a lot of time and a lot of skill to handle a case like this. Mr. Williams has a great deal of skill with respect to the issues relating to both the Local and the International in this case. He handled those and I think he handled them well and effectively in the pre-trial and at the trial of this case. From that standpoint it was very helpful to us and very beneficial to the class of plaintiffs to have the Hvass firm participate in this case.

Secondly, when you are talking about the kinds of expenses in a case such as this, well over $300,000 in expenses, it was very helpful to have another firm willing to participate in those fees. The Hvass firm did that all along. To me they are raising an issue which when you look at it objectively has absolutely nothing to do with this settlement proposal because they got very good, excellent representation because of the Hvass firm.

THE COURT: Does that answer you, Ms. Roback?

MS. ROBACK: I don't believe it does.

THE COURT: Why do we get involved in all of these side issues. We have enough important problems [198] here to resolve.

MS. ROBACK: I believe it is not a side issue that is involved. If the named plaintiffs and other class members had felt that the class was benefited by the settlement and were happy with the settlement as negotiated, I don't think it would be a problem. First of all, they never did know about Mr. Williams' reinvolvement until trial and they have an affidavit that states so that is attached to our Memorandum in opposition to the settlement. Secondly, I don't think the economic factor of sharing the costs justifies an ethical issue which is a firm that withdrew for a conflict of interest. At least they believed it enough to withdraw before the Court. I think the ethical considerations, and the fact the disposition of this case so far has not been favorable to the named plaintiffs and several other class members, that the issues are intertwined and they are a factor in the case.

THE COURT: You know, Ms. Roback, as well as I do, that we are very fortunate to have somewhat large firms that are able to carry the costs and expenses in this kind of a case. If Ms. Elliott or Ms. Ambrose had come to me and asked for your representation I, of course, would have to say that you are not qualified. You don't have the ability to carry a case like this and [199] I would have to tell that to any fairly young lawyer and courts around the country have been saying this. Maybe that is unfortunate that only a substantial law firm can afford to participate in a case like this because the experts want their money and want to be paid. Some won't testify until they are paid. It takes a substantial law firm—perhaps as I say, unfortunately—to carry this kind of a case. Your firm couldn't do it—maybe you could borrow the money from the bank, I assume, and obligate yourselves for $350,000.

MS. ROBACK: In response, Your Honor, I feel first of all we are in this now representing Ms. Elliott and Ms. Ambrose for the purpose of objecting to the settlement. We have no intention of retrying the case for them, for the record. But I want to say, too, that I feel Title VII is a method of vindicating social injustices and I don't believe the Legislature wanted it to be a sell-out for economic reasons.

THE COURT: Congress didn't provide in enacting Title VII for any protection for lawyers that are willing to carry an extended kind of litigation. For a small law firm, of course, it is impossible. For a young lawyer, it is impossible.

* * *

January 13, 1981

The Honorable Earl R. Larson
United States District Judge
Federal Courts Building
110 South Fourth Street
Minneapolis, Minnesota 55401

Re: Proposed stipulation of settlement in *Elliott v. Sperry Univac*
4-74 Civ. 627

Dear Judge Larson:

We are the named plaintiffs in the above-referenced case. We wish to give notice to the court that we have serious objections to the proposed settlement agreement that will be offered to the court. While we understand that we will have an opportunity at a later date to present our objections in full to the court, we did not want to wait to make known to the court the unusual circumstances that attended the settlement negotiations and the seriousness of our objections to the substantive conditions of settlement.

We were told that the settlement negotiations began on or about October 27 when Mr. Doty and Mr. Dermott White (Blue Bell, PA) conveyed a monetary offer to Mr. Jones and Mr. Bland. Mr. Bland responded with a written counter-proposal dated November 3, 1980. On or about December 23, 1980 class representative, Delores Elliott, visited the offices of plaintiffs' counsel and talked with Mr. Bradley Jones who informed her, to her surprise and dismay, that Mr. Charles Hvass, Sr. was negotiating the settlement. She asked why since Mr. Hvass, Sr. had withdrawn from the position of plaintiffs' counsel in 1973 because of a potential conflict of interest. He was counsel for

Teamsters and Teamsters were representatives of a local at Univac. Mr. Jones said that the conflict of interest was resolved two years ago. He indicated that Mr. Bland did not care who negotiated the settlement. He further said that Mr. Doty's law firm had engaged Mr. Hvass, Sr. to represent them in a suit involving an excessive fee complaint. On the plane trip to and from the eighth circuit court in St. Louis on which Mr. Doty, Mr. White and Mr. Hvass, Sr. were co-passengers it seems Mr. Doty decided that he would prefer to negotiate with Mr. Hvass, Sr. as he had greater rapport with him. Subsequently, Mr. Doty called Mr. Bland to say he had hoped that he had not hurt Mr. Bland's feelings and that he hoped he didn't mind. Interestingly, when Mr. Bland gave his account of Mr. Hvass' entrance into the case, he said that Mr. Dermott White was on the same flight to St. Louis and was impressed by Mr. Hvass and that Mr. White was the one who wanted Mr. Hvass as the negotiator for the plaintiffs. We expressed strong disapproval that Mr. Hvass, Sr. was involved at all because of our concern that his conflict of interest would color his judgment and because we felt that he was not sufficiently familiar with our case. We also didn't think it proper that the defendants should make the choice of who our negotiator would be. We expressed that we were not consulted nor was our approval sought at any point in time.

On December 30, 1980 we met with Mr. Bland to discuss the settlement offer. Briefly, he indicated that he had set the minimum amount that would be acceptable and that Mr. Hvass had negotiated a settlement above the minimum. We went over each point in the settlement as explained to us by Mr. Bland. We expressed our opinions on each of the terms at length and requested that further effort be made to improve the settlement. Mr. Bland said that there was nothing else to be negotiated; the agreement was already final and the only thing negotiable was the language that the defendant's counsel was presently writing. Mr. Bland asked us to make our decision and to advise him as to what our decision would be.

With due consideration as to our role as class representatives, we undertook the task of reviewing defendants' expert's, Mr. Hunter's, analysis of the PAC analysis to the best of our ability, we re-read Dr. Mendel's testimony as to the wage similarity as well as job task similarity or dissimilarity within and between job classes, and reviewed all aspects of the settlement. We were thus prepared to give our decision in written and verbalized form to Mr. Bland. A meeting was scheduled for January 6, 1981.

When we arrived at the offices of Mr. Bland, et al., we learned that Mr. Hvass was to attend the meeting. We felt that, rather than trying to explain the settlement to us, he wanted to force us into settling. He made many comments indicating he thought our case was weak. Among the most startling was his comment that we had nearly been thrown out of court on December 12 by defendant's motion to dismiss. When we asked him to explain why he thought so, he said he didn't have time to go into that. He also told us that if we refused the settlement, none of our attorneys would continue to litigate the case unless we raised $300,000 to pay them. He also told us that if we proceeded with the case and lost, we would be held personally liable for defendant's costs of $100,000 to $200,000.

At that meeting, we stated our unwillingness to settle the case until we received the job packets which we believe would substantiate our claims that assemblers are performing the same or equivalent work of EMA or PMO. We believe that the job packets with rebuttal testimony will provide concrete demonstration of our claims. We were told by our lawyers that they were not going to pursue job packets since Univac was not going to use them in its case. Our lawyers claimed this had always been their intention. We, on the other hand, had always had the impression that we would aggressively seek the job packets and present testimony based on them. At our meeting with Mr. Bland and Dr. Mendel it was determined that when the packets were received we and other employees would describe the work performed by the various job classes and the prints and tools or other equipment utilized in given job operations. We were to use a tape recorder, to the extent possible, in the interest of saving time and having accurate statements of persons currently engaged in the work. We still believe that we have a right to review the job packets and that we cannot really say what an appropriate settlement is until we have evaluated how strong that evidence is.

On January 8, 1981 we met with Mr. Bland in an attempt to obtain a copy of the proposed settlement. We were told that the final draft was not ready. On January 12, we picked up a copy of the settlement which is not the final draft and we also learned that the hearing date remains scheduled for January 16, 1981.

On January 13 we spoke by telephone with Dr. Mendel about the settlement. He said that he had been told by Mr. Bland that we agreed with the settlement and that we had had an opportunity to review the job packets and were unable to identify areas of overlap.

After careful consideration of all of the arguments which have been made to us, it is our position that the proposed settlement does not serve the best interests of the class nor does it serve the public interest. We have attached, hereto, brief comments or objections to each paragraph that relates to the current collective bargaining contract and settlement payments to the class.

It is our wish that the trial proceed as scheduled while both sides maintain an open door to settlement. Thank you for your consideration of our concerns.

Respectfully submitted,

/s/ Delores E. Elliott
1429 Edgerton
St. Paul, Minnesota 55101

/s/ Helen M. Ambrose
3528 27th Avenue South
Minneapolis, Minnesota 55406

cc: Mr. J. R. Bland

Our comments are necessarily brief inasmuch as the marginal comments are either unreadable or cause doubt as to their intent or impact, and that the terms are too general and are not performance specific. We are also brief for the reason that we find the terms are unreasonable. inadequate, and inequitable.

1. (a) Changing the name of assemblers does not get to the crux of the problem. It denies the diverse, special, and sophisticated skills required in the class. Such broad job categories have an adverse impact upon females. The protracted pay scale would continue to have an adverse socio-economic impact up-

on females until such time as a fair mix of males and females is achieved.

(b) Relieving the assembler class of one year of protracted pay and placing the burden upon another low paid job category is unacceptable.

(c) Univac has long desired a division of their military and commercial divisions. The employees have strongly resisted those efforts as it greatly diminishes job security. To divide the assemblers into three groups does still greater harm to job security. We strongly object to Univac employing this means to obtain that objective.

(d) No strong objection in consideration of the special skills required in the new state of the art in the computer industry.

(e) Margin notation not clear. No objection if back pay is awarded based on 1973 grievance and that the grievance on the new drill/router machine is resolved independently.

(f) No strong objection but believe a more generous time limit could be achieved based upon length of service.

2. Margin notations not clear. Willing to discuss Hay system versus PDRI. Believe monitor group necessary. Is not performance specific.

3. Margin notes make intent and impact unclear.

4. No objection if fair method is first defined with specificity and that the qualification criteria established is not greater that that held by the least qualified incumbent job holder. Object that determining an affirmative action *goal* is not performance specific.

5. No objection to greater notification to employees as to the availability of tuition reimbursement.

6. Object to limit of 1.5 million settlement fund as inadequate and inequitable.

7 & 8. Object that the limit of five categories pay point increments is inequitable as to females with greatest length of service.

* * *

We have an objection that the terms of the proposed agreement does not address past injustices such as those females as qualified but past over in promotion and those persons layed off out-of-seniority.

GRIEVANCE FORM

International Brotherhood of Electrical Workers
Local No. 2047

Plant 1 Dept. Receiving Inspection Step 1
Date 7-13-82 Time 10 PM

Subject of Grievance: Job & Sex discrimination. General Inspectors and Inspectors performing the same jobs—Macrodata and Fairchild testers—at different rates of pay.

Be advised that you are in violation of the following: Article XII Sec. 10, Article XVI Sec. 1 App. A, Article XVII, the Equal Pay Act (1963), the Civil Rights Act (1964) Title VII, and the Equal Employment Act (1972).

In summary: Equal pay for equal work. An employer cannot pay different pay rates to different sexes performing the same job.

Also be advised that aggrieved employees may seek relief under Title VII *without* invoking or exhausting available alternative legal or internal contractual remedies. (Caldwell v. National Brewing Co., 1971). Charges will be filed with the E.E.O.C. if this issue is not resolved immediately.

EMPLOYEE Shirley Walker Signed ——————
Mary Ann Nelson Employee
Julie Drees
Lorie Fenton
Mary Shamp

STEWARD Mary Harrigan Signed ——————
SUPERVISOR Dennis Timm Signed ——————
(Business Manager
for steps 2 & 3)

SUPREME COURT OF THE UNITED STATES

No. A-77

HELEN M. AMBROSE,

Applicant,

vs.

SPERRY RAND CORPORATION, ETC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 10, 1985.

Dated this 2nd day of August, 1985.

/s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

85-414 (3)

Supreme Court, U.S.
FILED
OCT 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. A-77

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HELEN M. AMBROSE,
Petitioner,

vs.

SPERRY RAND CORPORATION, a Delaware Corporation, The International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,
Respondents.

BRIEF FROM RESPONDENT SPERRY RAND CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1985—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

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QUESTION PRESENTED

1. Has petitioner demonstrated abuse of discretion by District Court and Circuit Court of Appeals in dismissing and refusing to vacate a settlement in a class action after the judicially approved settlement had been implemented?

Ruling below: No.

THE PARTIES

Delores Elliott	Plaintiff
Helen Ambrose	Plaintiff-Petitioner
Class of all other persons similarly situated	Plaintiffs-Respondents
Sperry Rand Corporation	Defendant-Respondent
The International Brotherhood of Electrical Workers, AFL-CIO	Defendant-Respondent
Local Union No. 2047 of the International Brotherhood of Electrical Workers	Defendant-Respondent

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BRIEF FROM RESPONDENT SPERRY RAND CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Notwithstanding plaintiff's references to various constitutional provisions, statutes and rules, there are no specific constitutional provisions or statutes at issue in this appeal. The only issue presently subject to appeal is the propriety of dismissing a lawsuit after a settlement has been implemented. The underlying lawsuit originally involved allegations concerning Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et. seq., the Equal Pay Act, 29 U.S.C.

§206, and other related statutes. The case proceeded as a class action pursuant to Federal Rules of Civil Procedure, Rule 23.

STATEMENT OF THE CASE

The original action was initiated by Delores Elliott and Helen Ambrose as a class action for alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 (e) et. seq., the Equal Pay Act, 29 U.S.C. §206, and other related statutes, claiming discrimination against female employees in the predominantly female bargaining unit of Sperry Univac in the Minneapolis-St. Paul area. The action was certified as a class action on May 27, 1976. *See Sperry Rand Corporation v. Larson*, 554 F.2d 868 (8th Cir. 1977). Trial commenced on September 8, 1980.

Following several weeks of trial and several months of negotiation, the parties reached a settlement in May, 1981. The Honorable Earl R. Larson, District Court Judge, issued his order on August 11, 1981, approving the settlement. Delores Elliott and Helen Ambrose appealed the order approving the settlement agreement, but the United States Circuit Court for the Eighth Circuit affirmed the settlement on June 23, 1982. *See Elliott v. Sperry Rand Corp.*, 680 F.2d 1225 (8th Cir. 1982). The *per curiam* opinion of the Court affirmed the District Court order except insofar as it had denied attorneys' fees to the named plaintiffs. No party petitioned for certiorari review of the order of the Eighth Circuit Court of Appeals.

Following the judicial confirmation of the settlement, defendants paid out to 3,105 class members a total of $1,762,618.47. Important equitable relief has been implemented, including amendments to collective bargaining agreements. In 1984, Sperry moved for dismissal of the lawsuit, on the basis of affidavits attesting to the compliance of defendants with all terms of the settlement agreement. After the District Court had conducted hearings on Sperry's motion to dismiss the lawsuit, Helen Ambrose filed a motion to invalidate the settlement upon various grounds.

On May 31, 1984, the Honorable Earl R. Larson issued two orders. One order dismissed the lawsuit on the grounds that the settlement terms had been implemented. A second order denied Ambrose's motion to invalidate the settlement. On September 10, 1984, the District Court entered an order denying Ambrose's motion for a new trial and invalidation of the judgment. Ambrose took an appeal to the Eighth Circuit. On March 11, 1985, the Eighth Circuit issued a *per curiam* unpublished order affirming the dismissal of the litigation. *See Ambrose v. Sperry Rand Corp.*, 760 F.2d 273 (8th Cir 1985). Ambrose moved for reconsideration by the Eighth Circuit. On May 13, 1985, the Eighth Circuit issued an order denying Ambrose's motion for reconsideration.

Ambrose has submitted a petition for a writ of certiorari to the United States Supreme Court, ostensibly raising on this appeal issues relating to the original settlement agreement. Generally speaking, however, the issues raised by Ambrose before this Court were not the issues presented in the limited proceedings in the courts below. In short, Ambrose attempts to raise issues before this Court which were not properly presented before the lower courts.

SUMMARY OF ARGUMENT

The District Court and the Circuit Court properly exercised their discretion in determining compliance with a stipulated and judicially approved settlement. Ambrose took no appeal from the 1982 opinion of the Eighth Circuit approving the terms of the settlement. The parties relied upon the settlement and have implemented the settlement. There has been no abuse of discretion, and the courts below acted properly in determining that this litigation should be dismissed.

ARGUMENT

The case does not involve important questions of law or precedent setting issues. Rather, the petition for a writ of certiorari reflects an isolated challenge of one individual to a settlement which has proven agreeable to more than 3,000 other class members. Petitioner does not properly characterize the issues below.

I.

The District Court Properly Dismissed This Action.

Sperry properly moved the Court for an order dismissing the action with prejudice. Sperry supported this motion with evidence of compliance with the stipulated settlement, including affidavits of defense counsel and Sperry personnel showing that the terms of the agreement had been met. The District Court conducted hearings concerning the proposed dismissal. The District Court agreed that Sperry had met all of the settlement terms.

In her appeal to the Eighth Circuit, Ambrose raised two limited objections to the dismissal. Those issues were carefully considered by the District Court and reviewed again by the Eighth Circuit. Both of the issues were essentially housekeeping matters. The lower courts properly exercised their discretion in determining that the parties had complied with the terms of the judicially approved settlement.

II.

The Lower Courts Properly Exercised Discretion In Refusing To Invalidate The Settlement.

After the District Court had conducted hearings on Sperry's motion to dismiss the appeal, Ambrose filed a motion to invalidate the settlement, claiming reliance upon various procedural rules. The trial court found no reason to disturb the prior approval of the settlement agreement. Her argument essentially amounted to an effort to obtain reconsideration of the 1981 and 1982 settlement approval.

On an appeal from an original approval of settlement, the standard of review is limited to a question of abuse of discretion. The Eighth Circuit cases on this subject are in accord with settled and standard doctrine. *See e.g., Elliott v. Sperry Rand Corp.,* 680 F.2d 1225 (8th Cir. 1982); *Reynolds v. National Football League,* 584 F.2d 280 (8th Cir. 1978); *Grunin v. International House of Pancakes,* 513 F.2d 114 (8th Cir.). *cert. denied,* 423 U.S. 864 (1975). This petition does not, however, involve the orders for settlement approval, despite petitioner's implications to the contrary.

Orders approving settlement in class action cases are final and appealable. *See Rules of Civil Procedure,* Rule 23 (e), *Research Corp. v. Asgrow Seed Co.,* 425 F.2d 1059, 1060-1061 (7th Cir. 1970). *Cf. Deposit Guaranty National Bank v. Roper,* 445 U.S. 326, *rehearing denied,* 446 U.S. 947 (1980). Petitioner objected to the settlement and had her appeal considered by the Eighth Circuit. Petitioner did not, however, seek certiorari from the 1982 order of the

Eighth Circuit. Thus, she exhausted her appeal from the order affirming settlement in 1982.

Now, in a collateral attack on the settlement orders, Ambrose would have the courts disturb the orders approving the original settlement. Her motion should be treated as a motion under Rule 60(b). The motion came too late. Ambrose's motion to invalidate the settlement came nearly a year and a half after the Eighth Circuit had issued its approval of the settlement and after all parties had irretrievably relied upon the final settlement terms. Motions to set aside a judgment must be timely and are, in any event, addressed to the discretion of the court. *See Pioneer Insurance Company v. Gelt,* 558 F.2d 1303, 1311-1312 (8th Cir. 1977) (60(b) motion must be filed within one year; "appellate court will not disturb the exercise of [trial court's] discretion in the absence of abuse"); *Chicago Northwestern Railway Company v. Union Packing Company,* 527 F.2d 592 (8th Cir. 1976) (*per curiam)* (60(b) motion denied because it was made more than one year after judgment).

Special considerations apply when a party seeks to reopen a class action judgment.

> A too liberal application of Rule 60(b) in class actions would undermine the finality of judgment entered therein and would discourage settlement of such actions.

In re Four Seasons Securities Laws Litigation, 59 F.R.D. 667, 677-678 (D. Okl. 1973), *reversed on other grounds,* 502 F.2d 834 (10th Cir. 1974), *cert. denied, Ohio v. Arthur Andersen & Co*.. 95 S.Ct. 516. Here, petitioner urges this court to reopen a judgment that has produced significant equitable relief, including amendments to collective bargaining agreements, and that has produced significant payments to 3,105 class members. If the Court were to rule that such judgments can be reopened without extraordinary showings, beyond those offered by petitioner, the ruling would greatly discourage thoughts of settlements of class actions.

Notwithstanding that petitioner proceeds pro se, this Court should not be overly sympathetic to petitioner's failure to consider the applicable procedural rules. Her study and experience have equipped her well to manipulate the appropriate procedural aspects of the case. Also, at various stages of this litigation, petitioner has been represented by three different law firms. At every applicable point in the proceedings below, the District Court and the Eighth Circuit have extended deadlines and permitted supplemental filings by Ambrose. The Courts have shown extraordinary patience for Ambrose and have given her a full and fair hearing at every juncture. Nothing more can be served, however, from a further hearing of the issues she has raised.

III.

The Original Settlement Was Valid And Should Not Be Upset.

To the extent that this Court has interest in petitioner's allegation of conflict of interest, Sperry wishes to point out that Ambrose has never identified any allegations of conflict of interest involving her trial counsel, Richard Bland, and his firm of Meagher, Geer, Markham, Anderson, Adamson, Flaskamp & Brennan. Neither has appellant complained that her appeal attorneys, Roback and Wolf, suffered from any conflict of interest. Yet, neither the

Meagher, Geer firm nor Roback and Wolf presented any specific allegations of an improper conflict of interest on the part of any of the other participants.

Further, the conflict of interest charges raised by Ambrose have been considered by the Ethics Committee of the Hennepin County Bar Association and the Minnesota Lawyers Professional Responsibility Board. Both groups concluded that there was no conflict of interest. Judge Earl R. Larson has similarly concluded that there was no conflict of interest and no ethical violation. Finally, the Eighth Circuit specifically considered and rejected Ambrose's claims of conflict of interest.

With regard to the technical merits of the class action itself, suffice it to say that the legal and factual issues were hotly disputed. The settlement reached below was reasonable from all perspectives in view of the uncertainties involved.

It can be conceded that Elliott and Ambrose were unhappy with the settlement and with the counsel for the class in 1981 when they took their prior appeal. Obviously, Ambrose is still unhappy with the settlement and class counsel. Her isolated views are not reflective, however, of the views of the 3,105 class members who have accepted payments totalling $1,762,618.47. Ambrose has fallen far short of demonstrating reasons to justify calling upon all of the parties to unwork the settlement at this late date.

CONCLUSION

This case does not present well formed issues of important public policy. Rather, Ambrose's arguments present a confused hodgepodge of criticisms which lack support in the record. The lower courts have exercised their discretion in an appropriate manner and have given extraordinary attention to appellant's pro se claims. The petition for a writ of certiorari should be denied.

Dated: October 7, 1985.

Respectfully submitted,

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No. 85-414 ④

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DELORES ELLIOTT,
Respondent,
HELEN M. AMBROSE,
Petitioner,
AND ALL OTHER PERSONS SIMILARLY SITUATED,
Respondents,
vs.
SPERRY RAND CORPORATION, a Delaware Corporation; THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO and LOCAL UNION NO. 2047 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT CLASS OF ALL OTHER PERSONS SIMILARLY SITUATED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW (FROM PETITION)

1. Whether Rule 23 (d) (2) and (e) mailed notice(s) to the plaintiff class, under all of the circumstances present, were constitutionally sufficient absent notice of fact and apprisal [*sic*] that co-counsel held appearance of or potential for conflict of interests?

Ruling below: Yes.

2. Whether plaintiff class counsel and co-counsel were adequate representative parties [*sic*] under Rule 23 (a) (4) and constitutionally sufficient representatives for plaintiff class?

Ruling below: Yes.

3. Whether the application of the rules, procedures adopted, and judgments rendered were within the proscriptions of the Rules Enabling Act §2072 (1966) and constitutionally sufficient?

Ruling below: Yes.

4. Whether final judgment order is entitled, under Rule 23 or constitutionally, to full faith and credit?

Ruling below: Yes.

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are those set forth in the caption of this Brief. Petitioner's caption is wrong. Petitioner's caption lists only herself and Sperry Rand Corporation as parties to this petition but, by footnote, states: "Petitioner does not intend to abandon claims as to other parties who may later claim or be deemed to be parties of interest." The caption on this Brief, submitted on behalf of the Class of All Other Persons Similarly Situated, contains the complete list of all parties affected by the Orders and Judgments of the United States District Court for the District of Minnesota from which petitioner appealed to the United States Court of Appeals for the Eighth Circuit. Although Respondents Delores Elliott; The International Brotherhood of Electrical Workers, AFL-CIO and Local Union No. 2047 of the International Brotherhood of Electrical Workers did not participate in the appeal, they were subject to the appellate Court's jurisdiction and judgment affirming the District Court. Those three respondents and the Class of All Other Persons Similarly Situated are likewise affected by these proceedings; Petitioner's caption must be changed to reflect the interests of all parties, as set forth in the caption of this document.

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C—Elliott v. Sperry Rand Corporation, No. 4-74 Civ. 627 (D. Minn. August 11, 1981) (Memorandum Order Approving Stipulation of Settlement). C-1

D—Elliott v. Sperry Rand Corporation, 680 F.2d 1225 (8th Cir. 1982) (per curiam). D-1

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No. 85-414

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DELORES ELLIOTT,

Respondent,

HELEN M. AMBROSE,

Petitioner,

AND ALL OTHER PERSONS SIMILARLY SITUATED,

Respondents,

vs.

SPERRY RAND CORPORATION, a Delaware Corporation; THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO and LOCAL UNION NO. 2047 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT CLASS OF ALL OTHER PERSONS SIMILARLY SITUATED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Class of All Other Persons Similarly Situated (hereinafter "Class"), respectfully prays that no writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered on these proceedings on March 11, 1985, on which rehearing was denied by Order, dated and entered, May 13, 1985.

OPINIONS AND JUDGMENTS BELOW

These proceedings were precipitated by District Court Orders and a Memorandum that were decided on May 31, 1984, set forth in Class' Appendix G. The Eighth Circuit affirmed the District Court on May 11, 1985, Class' Appendix I, and denied Petitioner's request for rehearing on May 13, 1985, Class' Appendix J. Other Orders, Memoranda and Opinions of the District Court and the Eighth Circuit that must be considered in determining whether to issue the Writ are set forth in Respondent Class' Appendices A, B, C, D, E, F, H and K and in Petitioner's Appendix at A-24 to -62. The decisions set forth in referenced Class' appendices A, B and D are reported at 554 F.2d 868, 79 F.R.D. 580 and 680 F.2d 1225, respectively.

AUTHORITIES INVOLVED

Petitioner suggests that certain constitutional provisions, statutes and rules are involved, as set forth in her Petition. Respondent Class wishes to add that pertinent provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.; the Equal Pay Act, 29 U.S.C. §206, and the Labor Management Relations Act, 29 U.S.C. §157 et seq. were also the subject of the underlying litigation. Rule 17 of this Court must be addressed, as must Rules 23, 59 and 60, applicable to the District Courts.

STATEMENT OF THE CASE

On December 9, 1974, this suit was filed by Petitioner, Respondent Elliott and Roberta Pettit (President of the Minnesota branch of the National Organization of Women), seeking relief on behalf of a class of female members of respondent unions, who were employees of respondent Sperry Rand Corporation (hereinafter "Sperry"). The Complaint alleged violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq.; the Equal Pay Act, 29 U.S.C. §206 and the Labor Management Relations Act, 29 U.S.C. §157 et seq. Petitioner herein, Respondent Elliott and Roberta Pettit sought judicial recognition of their status as class representatives. (Pettit was later dismissed as a party because she lacked standing.) Extensive discovery of the named plaintiffs and others was conducted by Sperry and the unions, in an attempt to establish, *inter alia,* that named plaintiffs did not satisfy the legal requirements of class representative status.

On May 27, 1976, Judge Larson conditionally certified the class, rejecting all arguments that named plaintiffs Ambrose and Elliott were not adequate class representatives despite or rather, because of, their long history of adversarial activities with respondent-defendants herein. Judge Larson's Order is set forth in Petitioner's Appendix at A-24 to -62. Sperry then sought a writ of mandamus from the Eighth Circuit, which was denied. *Sperry Rand Corporation v. Larson,* 544 F.2d 868 (8th Cir. 1977) (reprinted in Class' Appendix A).

On July 12, 1978, Judge Larson modified his May 27, 1976 Order by redefining the class. *Elliott v. Sperry Rand Corporation,* 79 F.R.D. 580 (D. Minn. 1978) (reprinted in Class' Appendix B).

Extensive discovery on the merits preceded trial, which commenced on September 8, 1980. Plaintiffs rested on October 21, 1980. Although there were settlement discussions that took place after plaintiffs rested and discovery depositions of Sperry's experts were taken, settlement discussions did not begin in earnest until after defendants' Rule 41 (b) Motions were denied from the bench, on December 12, 1980. At that time, Judge Larson made unconditional his July 12, 1978 ruling regarding the class representatives and found class counsel to have been competent, as required by the Federal Rules of Civil Procedure.

On Ma y 20, 1981, counsel for the various parties signed a settlement agreement although the named plaintiffs indicated they objected to the terms of settlement and had hired separate counsel. The objections of named plaintiffs and certain class members were rejected in Judge Larson's Order of August 11, 1982, set forth in Class' Appendix C, approving the settlement.

Petitioner's Statement of the Case identifies the two law firms that represented the class. Shortly after entry of the above Order approving the settlement, the named plaintiffs filed ethics violation charges against the individual lawyers of the two law firms that represented the Class. At about the same time, named plaintiffs filed an appeal from the Order approving the settlement.

Petitioner's brief correctly states that all such ethics charges were dismissed and the case closed, on or before December 2, 1981. On June 23, 1982, the Eighth Circuit, per curiam, affirmed Judge Larson's Order approving settlement, but ordered payment of named plaintiffs' attorneys out of the settlement funds designated for payment of attorneys. *Elliott v. Sperry Rand Corporation*, 680 F.2d 1225 (8th Cir. 1982) (reprinted in Class' Appendix D).

The Eighth Circuit, as had Judge Larson, rejected Petitioner's arguments of inadequacy of relief, inadequacy of procedures for enforcement and violations of due process.

On August 3, 1982, Judge Larson issued an Order directing that named plaintiff's counsel be paid from the attorney's fee fund created by the settlement agreement. The opinion is set forth in Class' Appendix E.

On September 28, 1982, Judge Larson ordered the Class settlement funds to be distributed, pursuant to stipulation, signed by counsel for all parties, including Petitioner's own counsel. The Order and Stipulation are set forth in Class' Appendix E. The funds were distributed, accordingly.

In late 1983, Sperry moved the Court for an Order of dismissal of the case, upon a showing of full compliance with the Settlement Agreement. Petitioner objected and sought, once again, to set aside the settlement. Petitioner, in effect, requested a new trial. On May 31, 1984, Judge Larson issued two Orders and a Memorandum, dismissing the case as to all parties and claims on the merits and denying Petitioner's Motions to Invalidate the Settlement and to Stay Order for Judgment. These are set forth in Class' Appendix G.

On June 8, 1984, Petitioner filed an appeal but also moved once again, for a new trial and for an amended judgment.

On September 10, 1984, Judge Larson issued an Order denying Petitioner's Motion of June 8. Judge Larson treated these Motions as though they sought reconsideration of his May 31, 1984 Orders, even though Petitioner had already appealed from those Orders. This Order is set forth in Class' Appendix H.

On March 11, 1985, the Eighth Circuit affirmed the

May 31, 1984 judgment of the District Court, after a review of the entire record. The Eighth Circuit per curiam opinion is set forth in Class' Appendix I. The Eighth Circuit denied rehearing on May 13, 1985 as set forth in Class' Appendix J.

On September 9, 1985, Petitioner filed her request for a writ of certiorari. The Class opposes Petitioner's request.

SUMMARY OF ARGUMENT

The Class opposes the Petitioner's request for a writ of certiorari for all of the reasons given by the Courts below in 1) denying Petitioner's motions for a new trial and motions to set aside the settlement and 2) in dismissing the case in its entirety and on the merits. Petitioner's motions were not brought in a timely manner, as prescribed in the Rules of Civil Procedure. Finally, Petitioner cannot now seek to set aside the settlement when her own counsel, acting on her behalf, stipulated to distribution of all settlement funds.

Petitioner has not stated and indeed, could not have stated, any factual or legal basis, pursuant to this Court's Rule 17, that would suggest that this Court should exercise its discretionary powers to issue the Writ.

REASONS WHY THE WRIT SHOULD NOT BE ISSUED

All parties and the District Court recognized the strengths and weaknesses of the arguments advanced by the Class and Petitioner at trial. The compromise was a means by which every Class member, including former employees of Sperry, could be afforded some monetary relief and by which all current employees of Sperry would be afforded equitable relief, regardless of whether each person was discriminated against, in fact.

The settlement agreement vested the District Court with absolute power to supervise the terms of the agreement and, upon proof of compliance, the Court, in its discretion, could dismiss the case upon facts presented by Sperry to the Court for its review. Upon facts presented to the Court by Petitioner, upon the argument of counsel, the District Court ordered judgment of dismissal, on May 31, 1984. Class' Appendix G. The reasons stated by the District Court in its Memorandum and by the Eighth Circuit in its per curiam affirmance of the District Court are adopted by the Class.

The Eighth Circuit has reviewed the entire record on three occasions. Two of those reviews took place after the District Court had approved the settlement. On both appeals, the Eighth Circuit could find no basis to set aside the settlement of the Class action because there was no evidence that Judge Larson had abused the exercise of his discretionary powers in applying Rule 23 of the Federal Rules of Civil Procedure.

Petitioner's attacks on Class counsel and Judge Larson are not surprising. Petitioner is now and always has been a well-intentioned, effective, genuine advocate of women's rights, union rank-and-file rights and employee rights. She has become more skilled than many lawyers in the practice of law because of her litigious activities during the last 25 years, against all respondent-defendants herein. Unfortunately, Petitioner has not attended law school or become so proficient in the practice of law as to learn the legal criteria and means of stating claims upon application of facts. During the last ten years, it has become apparent that she believes that all who disagree with her are conspiring to deprive her and those she claims to represent of various rights, both statutory and constitutional. What Petitioner fails to recognize is that she has won on every issue that could have been won and as to that defendant, Sperry, against whom the only effective relief could have been afforded.

Petitioner and Delores Elliott, and they alone, caused massive changes in the manner in which females are hired and promoted by Respondent Sperry. The evidence presented at trial clearly showed a disparate impact on those few women who were denied promotions to certain job positions during certain years. Those job positions to which Sperry formerly applied arbitrary conditions of employment or promotion have now become positions available on a seniority basis or to those who can demonstrate compliance with validated criteria.

This case was settled by agreement of counsel and approval of the trial and appellate Courts after seven years of litigation, involving thorough and costly discovery and legal analysis. The Class was afforded the relief to which it would have been entitled had the matter been tried to a conclusion and decided in favor of the Class. To be sure, the Class had prayed for other relief in the form of equal pay for equal work which was not remedied by the settlement. Counsel for all parties and the District Court recognized, however, that the Class allegations on this issue were based not on identical job tasks but instead on a comparison of statistical information generated by a novel tool of industrial psychology known as the PAQ. Two of the job classes the class Petitioner alleged to be equal were

General Inspector (General Inspector "A"), all male, and Inspector (General Inspector "B"), all female. Dr. Raymond Mendel's expert analysis of the results of the PAQ did not show these jobs to be equal. Plaintiff Ambrose's arguments of the equivalance of Teamster-Unit Mechanical Inspectors (all male) to General Inspectors and to Inspectors, unequal job classes, is therefore unfounded. Even if the Inspector job classes were equal, there remains today a legal question of whether persons doing different job functions can be compared so as to state a claim for which relief can be granted under either Title VII or the Equal Pay Act.

Class counsel Bland, by his Affidavit submitted to the District Court, has denied any recollection of discussions with Jennie Hodder involving the Teamsters-Unit Mechanical Inspectors until trial. Even if there had been such conversations in 1976, the time period of filing charges against the Teamsters Local and International and Sperry may have expired. The Class had been or was about to be certified. No Class member had standing to make any allegations against the Teamsters or against Sperry in this regard. If one Union (the Teamsters), had bargained more skillfully than another, (the IBEW), thereby obtaining higher pay for its members, the difference in pay did not constitute sex discrimination by Sperry against female members of the IBEW unit. Analysis of information generated by the costly and exhaustive manual and computer analysis of the applicant flow data did not demonstrate that Sperry deprived any female members of the Class of the opportunity to apply for work in the Teamster bargaining unit.

The District Court supervised this case for more than nine years. In the six weeks of trial it received hundreds of exhibits and listened to thousands of pages of testimony. The Court had designated Class counsel upon certification and, when plaintiffs rested their case, found class counsel to have been competent and vigorous representatives of the interests of the Class. None of the arguments raised by plaintiff Ambrose in support of her Motions to set aside the settlement is related to the facts discovered or presented to the District Court, the Eighth Circuit or to this Court. Instead, Ambrose's arguments are a continuation of her incessant attacks upon Local 2047 and the International, alleging less than adequate representation of the membership. This was never a Union representation case nor could it have been. There is nothing to prevent Ambrose and those who share her views from taking further steps, including litigation, in the crusade against the Unions. Furthermore, if Ambrose believes that Sperry continues to discriminate illegally, there is nothing to prevent her from filing discrimination charges with the appropriate administrative agencies or commencing litigation against the appropriate parties, seeking relief according to recognized legal theories.

The issues raised by Ambrose that were most recently reviewed by the lower Courts had been previously addressed by the District Court, in 1981, and the Eighth Circuit, in 1982, in their approval of the settlement and by the Ethics Committee in 1981. Ambrose brought her Motion to Invalidate and Stay pursuant to Federal Rules of Civil Procedure 59 and 60.

On the present record, Ambrose's citation of Rule 59 can be read only as a request for a new trial. Rule 59 (a) (2) states that such a Motion must be based on principles of law pronounced by Courts of equity prior to the adoption of the rules of civil procedure. The only support for the Ambrose Motion is the alleged conflict of interest. Named plaintiffs did not urge the District Court (at the time of the fairness hearing in 1981) or the Eighth Circuit (on the appeal from the fairness hearing in 1982) to set aside the settlement on the basis of any alleged conflict of interest. This was expressly recognized and so stated in the opinion of the appellate Court. *Elliott v. Sperry Rand Corp.*, 680 F.2d 1225, 1227) (8th Cir. 1982). Instead, named plaintiffs elected to charge counsel with conflicts of interest in proceedings before the Ethics Committee and the Lawyers Professional Responsibility Board. Their charges were fully investigated and dismissed as without merit by the panel having jurisdiction over these charges. A complete record of those proceedings (except for the purely internal documents to which neither the complaining parties nor responding parties have had access) was furnished to the District Court by Ambrose, and is part of the record. The District and Appellate Courts have not found any conflict of interest on the part of Class Counsel.

The Class has nothing to gain and everything to lose should the settlement be set aside and trial resumed. Petitioner has not suggested how or that different counsel for the Class would improve upon the previously approved settlement. Ambrose offers no suggestions as to how all of the funds paid to class members would be returned, should the settlement be set aside. The consequences of setting aside the settlement would be unmanageable.

Ambrose alleges no clerical mistake in any Order of the District Court. Rule 60 (b) applies only where a party moves for relief from an Order upon a showing of certain facts. The allegations of Ambrose concerning conflict of interest were made to an appropriate forum which found the Complaint to be without merit. Ambrose should be estopped from raising such an issue again. Her failure to urge the alleged conflict of interest to the District Court and to the Eighth Circuit at the fairness hearing can also be viewed as a waiver. *Pioneer Insurance Company v. Gelt,* 558 F.2d 1303, 1311-1332 (8th Cir. 1977) (60 (b) motion must be filed within one year; "appellate court will not disturb the exercise of [trial court's] discretion in the absence of abuse"); *Chicago and North Western Railway Company v. Union Packing Company,* 527 F.2d 592 (8th Cir. 1976) (per curiam) (60 (b) motion denied because it was made more than one year after judgment). Rule 60 (b) also states that a Motion to relieve a party from an Order shall be made within a reasonable time and, with regard to certain allegations, within one year of the date of the Order. This District Court's original Order approving the settlement was entered in August of 1981. A second Order, subsequent to and in accordance with the Eighth Circuit decision approving the settlement, was entered in August of 1982. Petitioner's then attorney even stipulated to the distribution of settlement funds on September 28, 1982. More than one year passed until Petitioner brought her Rule 59 and 60 Motions in January 1984. The allegations that Ambrose is now making are also untimely. Assuming that some principles of law would have allowed the District Court to entertain Ms. Ambrose's Motion at any time, there is no justifiable reason for her not to have brought this Motion shortly after the August 1981 Order was entered and certainly not later than September 28, 1982, the date on which the District

Court ordered distribution of the settlement funds, pursuant to her own attorney's Stipulation. This Petition is therefore frivolous, not because Petitioner is seeking to harass but because, by her own actions and inaction in 1981 and 1982 and through her own counsel, Petitioner has acquiesced in and waived any rights she may have had to challenge the settlement.

This Court's Rule 17.1 (a) and (c) indicates some of the circumstances upon which a writ of certiorari might be issued. The only argument advanced by petitioner in support of her Petition appears to be that the Eighth Circuit

> has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Id. (a). There is no evidence or law to suggest that the Eighth Circuit departed from or sanctioned such a departure from the accepted and usual course of judicial proceedings for the reasons stated herein.

The Petitioner's Questions Presented were either 1) presented to the District Court and Eighth Circuit, both of which ruled adversely to Petitioner in or before 1982, other than in conjunction with this latest appeal, or 2) should have been presented to those Courts in 1981 or 1982 in conjunction with the judicial review of the settlement but were not, estopping Petitioner from raising those questions for the first time in this Court.

CONCLUSION

It is not in the best interests of the Class to set aside the settlement agreement. To do so might require the return of monies paid to the Class and, more significantly, would eradicate the significant benefits gained by women in Sperry's employ since the time the charges were filed on behalf of this Class in 1972. Those benefits were obtained because of Ambrose's actions in this litigation. Ambrose must understand, however, that Title VII is not a panacea; it circumscribes with particularity what remedies can be sought by lawyers on behalf of a class and concomitantly circumscribes the relief that can be afforded by the Court.

Plaintiff Ambrose objected to the settlement and appealed the Order approving the settlement through counsel other than Class counsel. The arguments made then in objection to the settlement are no different than those made now to set aside the settlement. There are no newly discovered facts. All arguments were made by Ambrose's counsel two years ago and decided by the District Court and the Eighth Circuit.

The Petitioner's claims against Sperry Rand Corporation and the unions have been asserted loudly and clearly since the mid-1960's. Those claims have been litigated. The remedies which she sought for the Class were awarded, where available as a matter of law or as a product of compromise. Some of the remedies afforded by the settlement were not otherwise available. The best interests of the Class have been served. Petitioner has had a profound and long-lasting impact on defendant-Respondents herein. Undoubtedly, Petitioner will continue her crusade in support of equal rights. Petitioner is to be admired for her perseverance and sense of justice; she is the only member of the Class to reject her award.

There is a time when every contest must end; this contest must end now. The request for issuance of the Writ should be denied.

October 9, 1985.

Respectfully submitted,

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APPENDIX

Appendix A

SPERRY RAND CORPORATION,
Petitioner,

v.

Honorable Earl R. LARSON, United
States District Judge for the District
of Minnesota, Respondent,

and

Delores Elliott and Helen Ambrose, and
all other persons similarly situated,
Respondents.

No. 76-1734.
United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 12, 1976.
Decided May 9, 1977.

Before GIBSON, Chief Judge, HEANEY and WEBSTER, Circuit Judges.

WEBSTER, Circuit Judge.

Sperry Rand Corporation, a defendant in a Title VII action brought by female employees, petitions this Court for a writ of mandamus to compel decertification of class union status previously granted conditionally to plaintiffs by the District Court.[1]

The complaint seeks injunctive relief against class-based sex discrimination in employment practices. In addition, back pay and attorneys' fees are demanded. Also named as defendants are Local Union No. 2047 of the International Brotherhood of Electrical Workers, and the International Brotherhood of Electrical Workers, AFL-CIO.[1]

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[1] The Honorable Earl R. Larson, United States District Court for the District of Minnesota.

I. *Availability of Mandamus*

Petitioner did not seek interlocutory review of the class action certification under 28 U.S.C. § 1292(b). Instead, it sought relief by way of the extraordinary writ of mandamus. This was a conscious procedural choice and it severely limits the scope of our review.[2]

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[1] This litigation began in December, 1974. In addition to their Title VII claims under 42 U.S.C. § 2000e *et seq.*, plaintiffs Delores Elliott and Helen Ambrose asserted claims for violation of the Equal Pay Act of 1963, 29 U.S.C. § 206, and the Labor Management Relations Act, 29 U.S.C. § 157 *et seq.* They sought to represent a class consisting of women who were, are, might have become, or might become members of the International Brotherhood of Electrical Workers, AFL-CIO [IBEW] and Local 2047 and who were, are, might have become, or might become employees of Univac at its St. Paul plants since July 2, 1965, and who have been, are, or might be adversely affected by the practices of which they complained.

Petitioner filed a motion asking the District Court to determine, *inter alia*, the propriety of bringing this suit as a class action. After submission of memoranda and oral argument, the District Court issued a memorandum order on May 27, 1976. It denied certification to the claims under the Equal Pay Act and Labor Management Relations Act, but conditionally certified the Title VII action for class action status under Fed.R.Civ.P. 23(b(2). It defined the class to include former, present and future female employees of Univac employed at its plants in and near St. Paul, Minnesota, who are, have been, or will be members of Local 2047 and IBEW during the period commencing July 2, 1965, and continuing to the date of trial.

[2] At oral argument, counsel for petitioner explained that this Court apeared to be inhospitable to interlocutory appeals from class action determinations. Because we do not accept that evaluation, we add these additional comments.

The impact of a class action determination on the dimensions of the trial and the exposure to liability can be enormous. *See Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 535 (8th Cir. 1975). This fact of life must be balanced against general judicial policy disfavoring piecemeal litigation. *See Will v. United States*, 389 U.S. 90, 96, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967). When a close question of class action *vel non* is presented, either under the facts or under statutory construction, district courts ought to be more receptive to certifying

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court,* 426 U.S. 394, 402, 96 S.Ct. 2119, 2124, 48 L.Ed.2d 725 (1976). As we said in *In re Cessna Distributorship Antitrust Litigation,* 532 F.2d 64, 68 (8th Cir. 1976):

> The remedy of mandamus is available only in those circumstances where the district court exceeds "the sphere of its discretionary power." *Will v. United States,* 389 U.S. 90, 104, 88 S Ct. 269, 278, 19 L.Ed.2d 305, 315 (1967). *See In re Cessna Aircraft Distributorship Antitrust Litigation, supra,* 8 Cir., 518 F.2d 213 at 216; *Pfizer Inc. v. Lord,* 456 F.2d 545, 547-48 (8th Cir. 1972). *See also Weight Watchers of Philadelphia, Inc., v. Weight Watchers International, Inc.,* 455 F.2d 770, 775 (2d Cir. 1972). Mandamus is an extraordinary remedy reserved only for extraordinary situations. *Stein v. Collinson,* 499 F.2d 91, 95 (8th Cir. 1974); *Gialde v. Time, Inc.,* 480 F.2d 1295, 1302 (8th Cir. 1973).

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critical questions for interlocutory review if it fairly appears that an immediate appeal may materially advance the ultimate termination of the litigation. It is a rare case in which a class action determination will qualify as a final order appealable under the collateral order doctrine. As a result, a party aggrieved by a class action determination and denied a section 1292(b) certification is relegated to seeking mandamus. This seriously narrows the scope of appellate review at a critical stage in the litigation and casts upon the district judge the uncomfortable role of a respondent, including the task of responding unless he chooses to rely upon the attorneys for the opposing party. We think that the legitimate objectives of class action litigation can best be served by our disclaiming any hostility interlocutory certifications in situations in which the district court should reasonably conclude that "the gravity of the class action certification issue require[s] an expedited hearing by this court." *In re Cessna Aircraft Distributorship Antitrust Litigation,* 518 F.2d 213, 216 (8th Cir.), *cert. denied,* 423 U.S. 947, 96 S.Ct. 363, 46 L.Ed.2d 282 (1975), *See, e.g., Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 169-72, 94 S.Ct. 2140, 40 L.Ed. 2d 732 (1974); *LaChapelle v. Owens-Illinois, Inc.,* 513 F.2d 286 (5th Cir. 1975): *Katz v. Carte Blanche Corp.,* 496 F.2d 747 (3rd Cir.), *cert. denied.* 419 U.S. 885, 95 S Ct. 152, 42 L.Ed.2d 125 (1974); *Herbst v. International Tel. & Tel. Corp.,* 495 F.2d 1308, 1311-13 (2d Cir. 1974).

Mandamus may be appropriate to review orders granting class action designation when the issue presented is one of clear usurpation of power by the district court. Thus, in *Schmidt v. Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975), we issued the writ where the District Court had granted Rule 23[4] class action certification in an action brought under the Fair Labor Standards Act notwithstanding the special and conflicting "opt in" requirements of that Act. *See* 29 U.S.C. § 216(b). Mandamus was similarly granted in *Pan American World Airways, Inc. v. United States District Court,* 523 F.2d 1073 (9th Cir. 1975), and *McDonnell Douglas Corp. v. United States District Court,* 523 F.2d 1083 (9th Cir. 1975), *cert. denied,* 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976), where the district court had ordered that next of kin of passengers killed in airline crashes be notified of other pending litigation against the airlines, thus exceeding its power under any statute, rule or equity power of the court.

It is our task to determine whether the action of the District Court in this case so exceeded its discretion as to be a usurpation of power requiring the issuance of the supervisory writ.

II. *The Merits*

Employment discrimination by definition has been construed as class-wide discrimination and the class action requirements have thus been broadly interpreted by the courts. *See Wright v. Stone Container Corp.,* 524 F.2d 1058 (8th Cir. 1975); *Bowe v. Colgate-Palmolive Co.,* 416 F.2d 711, 721 (7th Cir. 1969); *Jenkins v. United Gas Corp.,* 400 F.2d 28 (5th Cir. 1968). This of course does not obviate compliance with the requirements of Rule 23, *see Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968), nor will individual claims automatically become class claims without a showing that others in the class were victims of the same or similar employment patterns and practices. *See Wright v. Stone Container Corp., supra*, 524 F.2d at 1062.

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[4] Fed.R.Civ.P. 23.

The complaint in the present action alleges no claims peculiar to the named plaintiffs, Elliott and Ambrose; instead, it charges that plaintiffs and members of the class "have been and are being deprived of income in the form of wages and of prospective retirement benefits, social security and other benefits due to them as workers, solely because of their sex." The discriminatory employment practices affecting the class which are alleged to have jeopardized jobs and adversely affected opportunities for advancement are set forth in the margin.[5]

The main thrust of petitioner's claim to relief by way of mandamus is that the District Court's certification of the class under Rule 23(b) (2), combined with the order of notice to class members similar to that required under Rule 23(b) (3), operated to lock in antagonistic members of the class and at the same time foment litigation. It was this method of proceeding, ordered by the District Court pursuant to Rule 23(d), that petitioner contends was a usurpation of power by the District Court. In order to assess this contention, we must determine (1) whether the class action certification was so plainly inappropriate that it exceeded the court's discretion, and (2) whether the additional notice requirements were, under the circumstances present in this case, clearly outside the discretion of the District Court.

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[5] The discriminatory practices and policies alleged by plaintiffs include, but are not limited to, the following:

(a) failing and refusing to hire females on an equal basis with men at a rate of pay equal to that paid males;

(b) establishing and maintaining job classifications which result in exclusion or limitation of females because of their sex from jobs and job opportunities for which they are otherwise qualified and for which sex is not a bona fide occupational qualification;

(c) failing and refusing to provide training for females because of their sex for positions for which sex is not a bona fide occupational qualification;

A. *Class Action Certification*

The factual determinations upon which the District Court found that plaintiffs had satisfied the class action prerequisites of Rule 23(a),[6] even if arguably erroneous, do not warrant resort to supervisory mandamus. The District Court held that the requirements of numer-

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(d) failing and refusing to promote females because of their sex to positions for which sex is not a bona fide occupational qualification;
(e) establishing and maintaining seniority systems which result in more frequent lay-off of females from jobs than males;
(f) failing and refusing to pay females on an equal basis with men for substantially equal work;
(g) using subjective bases for promotion which result in discrimination against females in promotion. These subjective bases include, but are not limited to, the use of subjective and discriminatory reports and opinions from supervisors, invalid tests, invalid job requirements, repeated failures to consider the seniority of females when all other criterion [sic] and factors are relatively equal between applicants for promotion, and subjective and discriminatory granting of on-the-job training in promotion;
(h) failing and refusing to hire females for certain jobs, having females do jobs which are lower in pay, and by hiring female to do jobs which have fewer chances for promotion than jobs for which males are hired.

[6] Rule 23(a) establishes these prerequisites to maintenance of a class action:
(1) the class is so numerous that joinder of all members is impracticable,
(2) there are questions of law or fact common to the class,
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
(4) the representative parties will fairly and adequately protect the interests of the class.

osity, commonality of issues, and typicality had been met. *See* Fed.R.Civ.P. 23(a). These determinations are well within the trial court's "sphere of its discretionary power." *See Will v. United States,* 389 U.S. 90, 104, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967); *In re Cessna Aircraft Distributorship Antitrust Litigation,* 518 F.2d 213, 216 (8th Cir.), *cert. denied,* 423 U.S. 947, 96 S.Ct. 363, 46 L.Ed.2d 282 (1975). No discussion of these factors is required.

[8] A more concerted challenge is made to the District Court's finding that plaintiffs would fairly and adequately represent the class. *See* Rule 23(a) (4).[7] Our review under a petition for mandamus is limited to a determination of whether the District Court acted outside its discretion or so clearly ignored a compelling showing of inappropriateness that granting class action certification amounted to a denial of due process.

No challenge is made to the competency of plaintiffs' counsel. *See Eisen v. Carlisle & Jacquelin,* 391 F.2d 555, 562 (2d Cir. 1968). Instead, it is claimed that plaintiffs, as past officers of the union, engaged in activities in and out of office that were not consistent with the interests of other members of the class. Five sources of antagonism were brought to the District Court's attention:

1. Intra-union disputes which occurred from 1968-1970 while plaintiffs were union officers;

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[7] The issue of antagonism is occasionally considered in connection with Rule 23(a)(3)'s requirement of typicality. *See, e. g., Windham v. American Brands, Inc.,* 68 F.R.D. 641, 649 (D.S.C. 1975), *rev'd on other grounds,* 539 F.2d 1016 (4th Cir. 1976); *Kinsey v. Legg, Mason & Co.,* 60 F.R.D. 91, 99 (D.D.C. 1973); *Cannon v. Texas Gulf Sulfur Co.,* 47 F.R.D. 60, 63 (S.D.N.Y. 1969). It will suffice for our purpose to consider this issue under Rule 23(a)(4), where it is clearly material.

2. Plaintiffs, as former union officers, may be called as witnesses to defend the Local against charges that it is liable for discriminatory practices that occurred during the time they were in office;

3. Plaintiffs were suspended from office in 1970 by the International and prohibited from holding office for five years. Since that time they have initiated three different proceedings against the unions, suggesting an ulterior motive for this suit.

The class itself does not support this suit, as evidenced by a resolution of nonsupport passed 83-0 at a union meeting and by unsolicited petitions in which the signers stated they did not support the action.

5. Since plaintiffs' suspension period has ended, they are likely to run for office again and may be using this lawsuit to advance their political ambitions.

The District Court gave careful consideration to whether these factors disqualified plaintiffs as fair and adequate representatives of the class, guided by the following principles, which we hold to be correct:

> (1) the antagonism which will defeat maintenance of a class action must relate to the subject matter in controversy, as when the representative's claim conflicts with the economic interests of the class;
>
> (2) disagreements as to the remedy do not necessarily defeat a class action, especially in Title VII cases where the Court has broad powers in fashioning appropriate remedies; (3) the mere existence of political divisions or factionalism within a union does not require class decertification;

> (4) disagreements as to the wisdom of a union member's suing the union are not a proper basis for decertification;
>
> (5) union officers are not necessarily disenabled from suing on behalf of union members when the interests asserted are solely the interests of members and employees; (6) evidence of antagonism based on membership votes should be carefully scrutinized and should be clear and convincing; and (7) while questions of motive are secondary, the Court should be cognizant of the limitations of its supervisory powers and should be sensitive to the possible existence of ulterior motives which might jeopardize the interests of the class.[8]

In its carefully considered memorandum opinion, the District Court concluded that the frictions described above did not reach the subject matter of the suit; that plaintiffs' past history as union officers would not preclude a vigorous prosecution of the claims of class-based discrimination; that the evidence of lack of enthusiasm by other union employees was not reliable and in any event was not controlling; and that plaintiffs' private motives would not affect the merits of the case. No usurpation of power can be gleaned from these conclusions, singularly or in the aggregate, and a case for mandamus to review class action certification has not been made out on grounds of antagonism alone.[9]

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[8] *See Redmond v. Commerce Trust Co.*, 144 F.2d 140, 151-52 (8th Cir.), *cert. denied*, 323 U.S. 776, 65 S.Ct. 187, 89 L.Ed. 620 (1944). *See generally* C. Wright and A. Miller, 7 Federal Practice and Procedure § 1768 (1972).

[9] The District Court appropriately observed: Should genuine conflict arise in the future, the Court, being advised by counsel for the class, may remove any antagonism or, if necessary, decertify the class.

The District Court conditionally certified the class under Rule 23(b) (2). Rule 23 requires that in addition to finding, as here, that the four prerequisites of Rule 23(a)[10] have been met, there must be present one of the three alternative requirements of Rule 23(b). The District Court found that the provisions of subdivision (2) of Rule 23(b) had been satisfied:

> The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]

This provision was incorporated into Rule 23 with the 1966 amendment "primarily to facilitate the bringing of class actions in the civil rights area." 7A C. Wright and A. Miller, Federal Practice and Procedure § 1775, at 24 (1972).

Rule 23(b)(2) certification is appropriate when plaintiffs seek injunctive relief from acts of an employer "on grounds generally applicable to the class." Sex discrimination in employment is such a ground. *See Donaldson v. Pillsbury Co.,* 554 F.2d 825 (8th Cir. 1977); *Bowe v. Colgate-Palmolive Co.,* 416 F.2d 711 (7th Cir. 1969). That back pay may be a form of relief sought incidental to injunctive relief will not preclude certification under Rule 23(b) (2). *Senter v. General Motors Corp.,* 532 F.2d 511, 525 (6th Cir.), *cert. denied,* 97 S.Ct. 182 (1976); *Society for Individual Rights, Inc. v. Hampton,* 528 F.2d 905, 906 (9th Cir. 1975); *Rich v. Martin Marietta Corp.,* 522

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[10] *See* note 6, *supra.*

F.2d 333, 341 (10th Cir. 1975); *Jones v. Diamond,* 519 F.2d 1090, 1100 (5th Cir. 1975); *Nix v. Grand Lodge of Int'l Ass'n of Machinists,* 479 F.2d 382, 385 (5th Cir.), *cert. denied,* 414 U.S. 1024, 94 S.Ct. 449, 38 L.Ed.2d 316 (1973); *Robinson v. Lorillard Corp.,* 444 F.2d 791, 802 (4th Cir.), *cert. dismissed,* 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); *Bowe v. Colgate-Palmolive Co., supra,* 416 F.2d at 720; *Rodriquez v. Swank,* 318 F.Supp. 289, 295 (N.D. Ill. 1970); *aff'd without opinion,* 403 U.S. 901, 91 S.Ct. 2202, 29 L.Ed.2d 677 (1971). The District Court found that the fair representation requirement of Rule 23(a) (4) had been satisfied and we have held petitioner's mandamus challenge on that issue to be inadequate; hence there is no need to consider petitioner's argument that certification under Rule 23(b) (2) was inappropriate because of the presence of antagonism.

B. *Notice Requirements*

Under a Rule 23(b) (2) certification the class members are not entitled to notice of the action and are not entitled to "opt out" of the action if they so choose, as they would be under a Rule 23(b) (3) certification.[11] *See Rule* 23(c) (2). Because of its concern that some members of the class who did not favor a suit against the union or were less than trustful of plaintiffs' ability to represent the common interests of the class against petitioner and the unions would be "locked in," the District Court ordered that an appropriate notice be given to all members of the class. Such notice would inform the class members not only of the pendency of the litigation, but also of possible back pay awards and the right of individual class members to intervene and participate directly in the suit. Petitioner charges that certification under Rule 23(b) (2), combined with the District Court's proposed notice, puts an onerous burden of intervention on unwilling members of the class and that the District Court will "potentially be fomenting litigation unfairly against the defendants." This, petitioner argues, is a usurpation of power warranting relief by mandamus. We reject this contention.

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[11] Under a Rule 23(b)(3) certification, the court must find that:

> the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

We think that petitioner misconceives the purpose of the District Court in directing that notice be given. Rule 23(b) (2) specifically authorizes the District Court to require "for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action[.]" The discretionary power to require notice in a Rule 23(b) (2) action thus serves as a "safety valve" which should be utilized "freely to protect the rights of the absentee members" to assure that a judgment in a Rule 23(b) (2) action will be "binding on all the class members." 7A C. Wright and A. Miller, Federal Practice and Procedure § 1786, at 144 (1972). *See Sanders v. John Nuveen & Co.,* 463 F.2d 1075, 1082 (7th Cir.), *cert. denied,* 409 U.S. 1009, 93 S.Ct. 443, 34 L.Ed.2d 302 (1972). Far from usurping power, the District Court in this case acted to protect the interests of absentee members under a clear grant of discretionary power. We cannot read into this action a tacit recognition that it was done to alleviate a presently existing antagonism within the class with respect to the subject matter. It was rather a prudent safeguard against future antagonism which might affect the binding nature of a Rule 23(b) (2) judgment. Moreover, the District Court retains the power to decertify the class or create sub-classes if subsequent events indicate the need to do so. *See Donaldson v. Pillsbury Co., supra,* 554 F.2d at 832, n. 6.

III. *Conclusion*

We emphasize that petitioner's claims were reviewed here under the narrow standard applicable to a mandamus proceeding.[12] We do not say that the result would have been different under a 28 U.S.C. § 1292(b) interlocutory review, but it is clear that this case does not present the extraordinary situation for which mandamus is reserved. *See In re Cessna Distributorship Antitrust Litigation, supra,* 532 F. 2d at 68; *Stein v. Collinson,* 499 F.2d 91, 95 (8th Cir. 1974); *Gialde v. Time, Inc.,* 480 F.2d 1295, 1302 (8th Cir. 1973).

The petition for writ of mandamus is denied.

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[12] Thus circumscribed, we nonetheless express our concerns about the marginal nature of the class representatives in this case. We are confident that the experienced district judge will continue to monitor the performance of the class representatives and will take appropriate action if antagonisms going to the merits of the claim surface within the class. *See* note 9, *supra.*

APPENDIX B

Delores ELLIOTT, Helen Ambrose, Roberta Pettit, and all other persons similarly situated,

Plaintiffs,

v.

SPERRY RAND CORPORATION, a Delaware Corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

No. 4-74-Civ. 627.

United States District Court,
D. Minnesota,
Fourth Division.

July 12, 1978.

MEMORANDUM ORDER

LARSON, District Judge.

Defendant Sperry Rand has brought three motions before the Court: (1) to decertify the class, (2) in the alternative to amend the class certification, and (3) to strike all allegations in the complaint relating to the seniority system. The other defendants join in the motions. The motions are based in part upon three United States Supreme Court decisions decided after certification of this class action. *International Brotherhood of Teamsters v. United*

States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); and *East Texas Motor Freight System v. Rodriguez,* 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977).

1. *Motion to Decertify.*

Sperry Rand argues that the Supreme Court's decision in *East Texas Motor Freight v. Rodriguez, supra,* bears on the propriety of the class certification in this case in two respects. First, defendant suggests that under *Rodriguez,* a class should not be certified if the named plaintiffs are unable to prove their individual claims and therefore, in the interest of economy, the named plaintiffs' claims should be tried first. If those claims fall, defendants assert, *Rodriguez* mandate dismissal of the class action.

In *Rodriguez* the named plaintiffs did not move before trial for class certification. They confined their arguments and evidence at trial to their individual claims. The district court held against them on those claims and then dismissed the class action allegations. The Court of Appeals reversed and *sua sponte* certified the class. In reversing the Court of Appeals, the Supreme Court held that it was improper to certify the class because "it was evident by the time the case reached that court that named plaintiffs were not proper class representatives" because, among other things, they were not class members. *Rodriguez, supra,* at 403, 97 S.Ct. at 1896.

Rodriguez is clearly distinguishable from the case at hand. it certainly does not suggest that a district court should order plaintiffs to try their individual claims before certified class claims are tried. Such orders would undermine the principle that the merits of an action are not to be considered in determining the maintainability of a class action. *Miller v. Mackey International Inc.*, 452 F.2d 424 (5th Cir. 1971); *Elliott v. Sperry Rand*, No. 4-74-Civil 627, Memorandum Order, May 27, 1976, at 19; 7 Wright & Miller, *Federal Practice and Procedure*, § 1759 at 577-78 and Suppl. § 1759 n.81. Nor did the Supreme Court suggest that certified class claims must always be dismissed if named plaintiffs fail to prove their own claims—it expressly noted the distinction between cases in which individual claims are tried prior to any request for certification and cases in which a class is properly certified. *Rodriguez, supra*, 431 U.S. at 406 n.12, 97 S.Ct. 1891. In the latter situation, even if the individual claims fail, the class action may be permitted to proceed, depending upon the adequacy of named plaintiff's efforts on behalf of the class. *See Moss v. Lane Co.*, 471 F.2d 853, 855-56 (4th Cir. 1973). Finally, as this Court has noted before, in order to prove their individual claims, plaintiffs will probably proceed at trial by means of evidence which demonstrates class discrimination—the "economy" of trying individual claims first is thus questionable. In short, the Court sees no merit to this proposal and declines to grant a separate trial on this issue.

The second aspect of *Rodriguez* upon which Sperry Rand relies is the Supreme Court's discussion of antagonism between named plaintiffs and the class. Union members in *Rodriguez* had voted against a merger of two collective bargaining units; named plaintiffs, seeking to represent minority members of the union, requested such a merger in their complaint. The Supreme Court cited this as "another factor" militating against certification in that case. Sperry Rand argues that since this Court relied on the appellate opinion in *Rodriguez,* now overturned, it should reconsider its analysis of the antagonism question here.

The Court notes that its previous decision did not rely on *Rodriguez* alone, but on principles drawn from other cases as well. *Memorandum Order,* May 27, 1976, at 14-17. Moreover, the Supreme Court opinion cannot be viewed as holding that as a matter of law any vote by class members or putative class members contrary to some expressed view of named plaintiffs makes certification improper. That determination necessarily turns on the facts of each case. The relevant facts here were closely analyzed and the Court found that the vote involved was unreliable; the voters were not congruent with the class; it was unclear how much information the voters had and whether it was correct; and that the vote revealed little about the degree and nature of the opposition to the suit other than generalized displeasure. It was not even clear whether the voters opposed the particular relief plaintiffs seek. *Rodriguez* has no bearing on these factual findings.

Finally, defendant requests decertification because named plaintiff Elliott resigned from Sperry Rand in December of 1977. They assert that she is no longer a proper class representative because as a nonunion member she is in an adverse economic position to current employees who are union members. The latter may be required to pay for a damage claim, through their dues if the union is found liable, while Elliott is not faced with this possibility. But the class includes former employees and Elliott is a member of that group. Former employees have frequently been permitted to represent current employees. *See e. g. Reed v. Arlington Hotel,* 476 F.2d (8th Cir. 1972), *cert. denied* 414 U.S. 854, 94 S.Ct. 153, 38 L.Ed.2d 103 (1973). Moreover, the other named plaintiff is still an employee of Sperry Rand—if anything, Elliott's resignation is a positive factor, for we now have a current employee and a former employee representing a class composed of both groups. Finally, as the Court has noted before, should an actual conflict surface due to the factors defendants cite, it can appropriately be dealt with at that time.

II. *Motion to Amend.*

The class was conditionally certified and defined to include:

> "former, present, and future female employees of defendant Univac employed at its plants in and near St. Paul, Minnesota and who are, have been, or will be members of defendants Local and International, for the period commencing on July 2, 1965 and continuing to the date of trial."

Defendants request that the certification be altered as follows:

> "Those female employees of defendant Univac employed at its plants in and near St. Paul, Minnesota, who are, have been, or will be members of defendants Local and International, for the period commencing 180 days prior to the filing of the EEOC complaint enabling this Court to assume jurisdiction in this action, September 4, 1972."

September 4, 1972, refers to the date 180 days preceding the filing.

The amendment would limit the class to present employees and former employees who worked for Sperry Rand as of September 4, 1972. But it appears from defendant's supporting memorandum that it also wishes to limit the actionable *claims* in the suit to claims arising on or after September 4, 1972, a limitation which the proposed class definition does not accomplish because the scope of the claims and the membership of the class are not necessarily congruent. A *present* employee may assert claims arising in 1970, for example. The Court believes that the first issue—who may be a class member—can be resolved at this time. The second question is more complex, has little to do with the class definition, and may depend upon the facts as they subsequently develop; the Court will briefly discuss the issue in order to alert the parties to some of the Court's concerns in this difficult area of law, but resolution of the questions raised by defendants' memorandum will be deferred. Some background is helpful to an understanding of both issues.

As a general rule, complaints in Title VII cases must be filed with the EEOC in accordance with the time limits set out by the statute, 42 U.S.C. § 2000e-5(e).[1] Failure to make a timely filing with the EEOC is, of course, grounds for dismissal of an action in district court. In order to determine whether a charge is "timely," however, the Court must determine when the alleged Title VII violation occurred. This has proved surprisingly difficult, for some employment practices cannot logically be viewed as discrete "incidents" occurring at a particular point in time—a whole series of decisions, for example, may influence whether an employee is promoted. Courts have developed the concept of "continuing violations" to resolve timeliness questions, but the case law on this subject is inconsistent and confusing, for the concept is actually a conglomeration of several different ideas. The recent Supreme Court decision in *United Air Lines, Inc. v. Evans, supra,* appears to add to the confusion. It has been suggested that, at least before *Evans,* the theory was used in four different types of circumstances. *Schlei & Grossman, Employment Discrimination Law,* Chapter 28 (1976). This framework is a helpful way to analyze the theory, but the Court notes that the cases rarely fall neatly into one category or another and there may be additional methods of categorizing the cases not discussed below.

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[1] In some circumstances charges may be filed with State enforcement agencies and the time periods for filing vary. Since the period for filing with the EEOC relevant to this suit is 180 days, that figure will be used throughout this opinion as a matter of convenience.

The first situation, and perhaps the clearest, is typified by the example above—in some instances, different events occurring at different times may ultimately result in unlawful discrimination and the Court must determine which event triggered the running of the statute. Using the example of promotions, courts may consider factors such as when the employee was told of the promotion decision, whether others were subsequently promoted while the employee's application remained open, or how many levels of decision-making might be required in the structure of the employer's business. *See e. g., Cedeck v. Hamiltonian Federal Savings & Loan,* 551 F.2d 1136 (8th Cir. 1977). *See also Gates v. Georgia-Pacific Co.,* 492 F.2d 292 (9th Cir. 1974). *But cf. Phillips v. Columbia Gas Co. of W. Va. Inc.,* 347 F.Supp. 533 (S.D.W.Va. 1972), *aff'd*

474 F.2d 1342 (4th Cir. 1973). Although the "continuing violation" language may be used in this context, it seems that the courts are not really concerned with continuity so much as they are with practically assessing the employment situation from the lay person's viewpoint. The focus is on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights, or when he should have perceived that discrimination was occurring.

The second situation is quite different. An employee may challenge a series of events, all of which are alleged to have been discriminatory, but only one of which occurred within the relevant time period. An employee, for example, may be repeatedly denied a benefit; so long as the most recent denial occurred within the appropriate time period, no "continuing violation" question really arises, for the recent event fully supports jurisdiction. But the cases do not always clearly delineate this distinction. *Compare Cox v. United States Gypsum Co.*, 409 F.2d 289 (7th Cir. 1969), with *Marlowe v. General Motors Corp.*, 489 F.2d 1057 (6th Cir. 1973).[2] Moreover, once it is determined that the Court has jurisdiction because at least one event in a series was timely challenged, another question arises—can the employer be held liable for all of the events or only for the one occurring in the charge-filing[3] period? Plaintiffs will often argue in such cases that the violations were continuing, creating a pattern of discrimination against them, so that all of the events are actionable. Courts' responses to this argument vary. *Compare Tarvesian v. Carr Div. of TRW, Inc.,* 407 F.Supp. 336 (D.Mass. 1976), and *Loo v. George,* 374 F.Supp. 1338 (D.Hawaii 1974), with *Lattimore v. Loews Theatres, Inc.,* 410 F.Supp. 1397 (M.D.N.C. 1975), and *Fekete v. United States Steel Corp.,* 353 F.Supp. 1177 (W.D.Pa. 1973).

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[2] *Cox* has been cited for the proposition that layoffs are continuing violations, *Macklin v. Spector Freight Sys., Inc.*, 156 U.S.App.D.C. 69, 478 F.2d 979 (1973), but as Schlei & Grossman point out, it was actually a pleading case in which the court construed allegations of discriminatory layoffs to encompass allegations of discriminatory recall within the proper time period. *Schlei & Grossman, supra,* at 898-99. "Continuity" was thus not actually at issue.

[3] "Charge-filing period" refers to the period 180 days preceding the filing of charges with the EEOC.

The third situation is one in which allegations are made that the employer has engaged in a continuous, pervasive, institutionalized "system" of discrimination. The key question here is not necessarily whether a present violation exists, for the ongoing operation of the entire system is often at issue. But the standing of the charging party may be questioned because he is unable to point to a specific instance in the charge-filing period in which the system adversely affected him. An employer charged with maintaining an unlawful transfer system, for example, may argue that the plaintiff did not apply for a transfer within the statutory time limits preceding the filing and therefore has no cause for complaint. This issue is often resolved by theorizing that a challenge to systematic discrimination is always timely if brought by a present employee, for the existence of the system deters the employee from seeking his full employment rights or threatens to adversely affect him in the future. *See e. g., Rich v. Martin Marietta Corp.,* 522 F.2d 333 (10th Cir. 1975); *Wetzel v. Liberty Mutual Ins. Co.,* 508 F.2d 239 (3rd Cir.), *cert. denied* 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975). *See also Bartmess v. Drewrys USA, Inc.,* 444 F.2d 1186 (7th Cir.), *cert. denied,* 404 U.S. 939, 92 S.Ct.

274, 30 L.Ed.2d 252 (1971). The same question of whether events preceding the charge-filing period are relevant to liability may arise in this situation, as it does in the second situation described above; but in systematic discrimination cases, courts seem to simply assume that such events are actionable. In *Rich v. Martin Marietta, supra,* the Court of Appeals criticized the district court for relying on *post*-filing statistics in holding that defendant had not discriminated. *Id.* at 346.

Finally, the continuing violation rubric may be used where an employee charges that a present practice perpetuates the effects of past discrimination. In such cases, the present policy may be entirely neutral, but may carry forward the effects of abandoned and previously unchallenged discriminatory practices. These types of cases are perhaps the most difficult, for, at bottom, they do not raise purely procedural "timeliness" questions. Rather, they involve the substantive question of whether a particular employment practice that applies equally to all employees, and has no disparate impact on any group, is nevertheless unlawful because it fails to place prior discriminatees in their "rightful places." *See e. g., Marquez v. Omaha District Sales Office, Ford Motor Co.,* 440 F.2d 1157 (8th Cir. 1971).

Another, slightly different, aspect of what is indiscriminately called the "continuing violation" theory is whether former employees can properly assert continuing violation claims. If a charge is filed within 180 days of termination, the timeliness of the challenge to particular practices can be analyzed by one of the several methods discussed above. Thus, if a policy has remained in existence or a pattern of discriminatory events has occurred right to the date of discharge, the charge may be deemed timely. The former employee has standing to assert the claim because, within the charge-filing period, he was subject to the discriminatory policy or practice. This rationale appears to break down, however, if the filing occurs more than 180 days following termination. Whatever the nature of the charges, the suit would appear to be time-barred, for the last possible date upon which a policy or practice could have adversely affected the former employee was outside the statute of limitations. The Eighth Circuit has held that as a general rule former employees cannot use the continuing violation theory to excuse a failure to file within 180 days of their termination:

> "We do not think this [continuing discrimination] theory has any validity when asserted by a former employee. . . .
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> For such a former employee the date of discharge or resignation is the controlling date under the statute, and a charge of employment discrimination must be timely filed in relation to that date." *Olson v. Rembrandt,* 511 F.2d 1228, 1234 (8th Cir. 1975).

But see EEOC v. Western Publishing Co., 502 F.2d 599 (8th Cir. 1974) (In particular circumstances of case, discrimination continued after employment terminated).

Defendant's present motion to amend actually relates only to the last point. In a class action, the timely filing by any member of the class satisfies the filing requirement for the entire class. The filing does not operate, however, to bring into the class persons whose claims were time-barred when the filing occurred. Since the statute runs against former employees as of the date of their termination, it follows that they cannot be members of the class unless they were employed within the appropriate time limit preceding the representative filing, even if "continuing violations" are alleged. Many courts have so ruled. *See e. g., Laffey v. Northwest Airlines,* 185 U.S. App.D.C. 322, 365-66, 567 F.2d 429, 472-73 (1972); *Wetzel v. Liberty Mutual Insurance Co., supra; Coppotelli v. Howlett,* 76 F.R.D. 20 (E.D. Ill. 1977); *Carter v. Newsday,* 76 F.R.D. 9 (E.D.N Y. 1976). *But see Briggs v. Brown & Williamson Tobacco Corp., Inc.,* 414 F.Supp. 371 (E.D. Va. 1976). The discussion in *Laffey, supra,* is most helpful in analyzing this issue:

> "[The representative filing], it seems clear, however, cannot revise claims which are no loger viable at the time of the filing. Any other result would produce an anomaly. Time-barred members could not press their claims individually either before the Commission or judicial tribunals; and surely the employer's liability to them cannot be made to depend upon whether they come into court in a different character. . . . Not surprisingly, then, courts which have considered the question have uniformly held that only those employees who could have filed charges with the Commission individually when the class filing was made are properly members of the litigating class.
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> It is contended, however, in support of the District Court's inclusion of the disputed class members within its Title VII award, that the Title VII violations com-

> plained of were of a continuing nature and thus that all past and present stewardesses could have made timely filings . . . when the filing for the class occurred. . . We agree that where, as here, discrimination is not limited to isolated incidents but pervades a series or pattern of events which continue to within ninety days of the filing . . the filing is timely as to all similarly situated employees regardless of when the first discriminatory incident occurred.
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> * * * * * *
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> NWA does not dispute that the violations here are of a continuing kind. But NWA does contend that the discrimination could not be deemed continuing as to those who left the company's employ more than ninety days prior to the class filing. . . . We are in agreement. . . A severing of the employment relationship ordinarily terminates a discrimination against the severed employee, and activates the time period for filing charges with the Commission concerning any violation which occurred at separation or which may have been continuing up to the date thereof." 185 U.S. App. D.C. at 365-66, 567 F.2d at 472-73 (footnotes omitted).

Although defendant relies on *Evans* to support the amendment of the class defintion, the principles discussed above were developed before *Evans* was decided. Thus, other than to note that *Evans* is not inconsistent with these decisions, it is unnecessary to discuss that case in relation to this part of defendant's motion. The class definition as presently worded would include former employees who may have left defendant's employ long ago and whose claims have long been barred. The Court agrees with defendant that the class definition ought to be amended to cut out employees who left Sperry Rand, by involuntary discharge or quitting, more than 180 days preceding the filing of the complaint in this case.

This conclusion disposes of defendant's present motion. But as the Court has already noted, the amended class definition does not accomplish all that defendant apparently wishes to accomplish, for it cuts out some class members but does not affect the scope of the claims that may be asserted by the remaining class members. Some further discussion of *Evans* may be helpful to clarify this point.

Defendant apparently wishes to limit the actionable claims in this suit to claims arising on or after September 4, 1972, based on the decision in *United Air Lines, Inc. v. Evans, supra*. In *Evans*, a flight attendant who worked for United was forced to resign in 1968 when she married because the company had a "no marriage" rule. She was rehired in 1972, but was not credited with seniority for any service prior to the date of rehiring. She filed with the EEOC in February 1973 and subsequently brought suit. The District Court dismissed the complaint on the ground that the claim was time-barred for failure to file within 90 days of the separation in 1968. The Court of Appeals reversed and the Supreme Court reversed the Court of Appeals, holding that the complaint was properly dismissed. Evans contended that the complaint was timely because United was guilty of a present continuing violation. Two reasons were used as support for this argument: first, the seniority system illegally discriminated against her because she was treated less favorably than males hired after her termination but before her re-employment; and, second, that the seniority system perpetuated past discriminatory acts.[4] The Supreme Court rejected both arguments. It noted that United treated both males and females hired between 1968 and 1972 alike and, furthermore, did not grant seniority credit to either male or female employees who left before 1968 and were subsequently rehired. In short, the seniority system did not differentiate between similarly situated males and females on the basis of sex.

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[4] Encompassed in this argument was the theory that the system not only perpetuated past discriminatory acts, but that it was an existing policy that could always be timely challenged. Evans' claim came years after her original discharge and a year after rehiring.

As to the second argument, the Court agreed that the seniority system gave present effect to a past act of discrimination, but said:

> "But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). *A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed.* [Emphasis added]. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.
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> * * * * * *
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> Respondent emphasizes the fact that she has alleged a *continuing* violation. * * But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists. [Emphasis in original.]" *Evans, supra,* 431 U.S., at 558, 97 S.Ct., at 1889.

The Court added that the seniority system was immunized from attack under § 703(h) of the Act.

Defendant contends that the italicized *sentence* means that the entire theory of "continuing violations," presumably in all of its varied forms, has been put to rest. Understandably, the contours of defendant's argument are not entirely clear, for the implications of *Evans* are as uncertain as pre-*Evans* case law was diverse and confusing. Defendant may be asserting any one of several different propositions: (1) that the type of analysis courts use in the first situation discussed above to determine when plaintiffs should reasonably have been expected to bring their complaints is no longer viable; or (2) that evidence of systematic discrimination that occurred before September 4, 1972, is irrelevant to any finding of liability in this suit; or (3) that no neutral practice, whether or not it is tied to a seniority system, which perpetuates the effects of discrimination occurring before the charge-filing period is actionable; or (4) that even if a present violation is established, no class member whose claims arose before the charge-filing period and were based on the same type of discriminatory event is entitled to relief.

Post-*Evans* law on "continuing violations" is in disarray and support can be found for almost any of these propositions. The EEOC views *Evans* merely as holding, in accord with prior case law, that discharges cannot be deemed "continuing violations," but as having no other effect on the concept. EEOC Interpretative Memorandum, 46 U.S.L.W. 2028 (July 19, 1977). *See also Miller v. Miami Prefab*, 438 F.Supp. 176, 179 (S.D.Fla. 1973). A broader view is that *Evans* prohibits a plaintiff from building a prima facie case based on occurrences preceding the charge-filing period. *See Neloms v. Southwestern Electric Power*, 440 F.Supp. 1353, 1369 (N.D.La. 1977) (". . . the only actionable claims would be those that occurred within 180 days of the filing of the earliest charge of discrimination. . . . [T]he Court, in examining statistical evidence, must judge the hiring and promotions statistics, as well as others, from a point in time 180 days prior to the . . . filing"). *See also Dickerson v. United States Steel Corp.*, 439 F.Supp. 55, 69-70 (E.D. Pa. 1977). *But cf. Caldwell v. Seaboard Coastline R.*, 435 F.Supp. 310 (N.D.N.C. 1977) (*Evans* held not to affect class suit alleging a pattern or practice of discrimination).

The Eighth Circuit, in a two to one decision in a case very similar to *Evans*, decided that *Evans* barred the claim of a pre-Act discriminatee who challenged a presently neutral system which perpetuated past discrimination by denying her the same salary she would have had had the pre-Act discrimination not occurred. The case is thus broader than *Evans* in that it does not involve either post-Act discrimination or a seniority system. *Farris v. Board of Education of City of St. Louis*, 576 F.2d 765, filed May 17, 1978 (8th Cir.).[3] One court has also held that even where a present discriminatory practice is shown, relief can extend only to class members who were affected by the practice in the charge-filing period. *See Dickerson v. United States Steel Corp., supra. But cf. Miller v. Miami Prefab, supra.*

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[3] Judge Ross, dissenting in *Farris*, noted an apparent incongruity between the reiteration of the holding in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), in the *Teamsters* case, *International Brotherhood of Teamsters, supra*, at n. 15, and the statements of the Court in *Evans*. *Griggs* has been regarded as a "perpetuation" case and the Court in *Teamsters* acknowledged that but for § 703(h), the seniority system in *Teamsters* would fall under the *Griggs* rationale because the system perpetuated past acts of discrimination. In another sense, however, *Griggs* and *Evans* and *Teamsters* are not necessarily antagonistic, for *Griggs* is also the classic "disparate impact" case. That is, the practices struck down in *Griggs* were unlawful not only because they "perpetuated" the effects of a past act, but because the purportedly neutral requirements the employer imposed conveniently favored whites and disproportionately burdened blacks. Thus it would seem that a wholly neutral system that perpetuates a past act of discrimination against a particualr employee must be sharply distinguished from a purportedly neutral system which has a present disparate impact on a protected group.

Although the Court declines to express agreement or disagreement with these various positions at this time, it should be evident that it is difficult to treat *Evans* simply as a wholesale rejection of the continuing violation theory in all of its forms. When viewed against the complex background of years of Title VII litigation in which the concept develooped, the one-sentence dictum from *Evans* hardly appears to represent a considered judgment on every use of the theory in every situation.[*] The arguments on this issue must be considerbly refined and clarified before a decision can be reached on the possible applications of *Evans* here. Perhaps no "continuing violation" question will arise at all during the liability phase of the suit, for plaintiffs have alleged that violations exist at present and it is unclear how far back plaintiffs' proof might go; or, perhaps, the application of *Evans* will be relevant to some claims, or some class members, but not to others. In short, if the factual issues are more clearly presented and the legal arguments consequently more narrowly defined and focused, the task of the parties and the Court will be far more manageable. Although another pretrial motion might suffice to present the questions with sufficient specificity, this determination may have to await trial on the merits.

III. *Motion to Strike.*

All of the defendants make the final point that a separate trial should be held on the seniority system, for purposes of economy. If the seniority system is bona fide, they assert, the seniority claims can be stricken and, moreover, *all* of plaintiffs' claims will fall and the case will be at an end. This is premised on the assumption that all of plaintiffs' claims are tied in some fashion to the seniority system rather than to other practices. Although the Court agrees that the bona fides of the seniority system is an important issue, for the system may be immune from attack under *Teamsters, supra,* it is not at all clear that plaintiffs' complaints relate solely to seniority; the allegations are quite to the contrary. The Court therefore cannot agree at this time that a separate trial is in order, for even if the bona fides of the system are established, it is not certain that the necessity for further trial would be obviated.

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[*] The Supreme Court did not even mention, for example, the fact that Congress has expressed approval of the continuing violation theory. *See* 118 *Cong. Rec.* 494 (1972).

But the Court is aware that one of defendants' concerns underlying this request, as well as the other request for a separate trial, is that the particulars of plaintiffs' case are difficult to identify and the precise nature of the charges is unclear. The Court therefore feels that an Order for pretrial statements must be entered so that the Court and the parties can anticipate the legal and factual issues that may arise.

IT IS THEREFORE ORDERED THAT:

1. Defendants' motion to decertify the class is denied.

2. Defendants' motion for a separate trial of named plaintiffs' claims is denied.

3. Defendants' motion to amend the class certification is granted. The class shall be defined as follows:

> Those present and future female employees of defendant Univac employed at its plants in and near St. Paul, Minnesota, and woh are or will be members of defendants

Local and International, up until the date of trial; and those former female employees who were employed by defendant Univac at its plants in and near St. Paul, Minnesota, and who were members of defendants Local and International, on September 4, 1972, or thereafter.

4. Defendants' motion for a separate trial on the seniority system is denied.

5. A pretrial conference will be held on Friday, September 1, 1978, at 9:00 A.M.

The attorneys for the respective parties are hereby directed to submit to the Court before August 25, 1978, the following:

(a) A written stipulation or statement of the uncontested facts.

(b) A written statement which shall contain for each allegation in the complaint a concise summary of the essential facts pertinent to the allegation; and a recital of the contested issues of fact; and recital of the contested issues of law relating to each claim. The attorneys shall exchange these written statements prior to the conference. At the conference the Court will consider (1) simplification of the issues and (2) desirability of further pretrial orders relating to the conduct of the litigation.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, and all other persons similarly situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

MEMORANDUM ORDER

4-74-Civ. 627

The Court now has before it in this action the Petition of plaintiffs and defendants seeking an Order under Rule 23 approving the Stipulation of Settlement of this lawsuit entered on May 20, 1981. Counsel for the objecting named plaintiffs oppose the Petition and request an Order requiring the parties to either renegotiate the settlement agreement or resume the trial of the case. Seven hundred ninety of the 4,100 class members filed objections with the Court. The attorneys for the class and the attorneys for the named plaintiffs seek attorneys' fees and costs and expenses. Hearings were held on July 27, 1981, and on July 30, 1981.

Rule 23 (e) (3) of the Federal Rules of Civil Procedure requires the Court to approve the settlement of a class action. In determining whether to approve a proposed settlement, the Court must find that the agreement is fair, adequate, and reasonable. *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). *See also Reynolds v. National Football League*, 584 F.2d 280, 282-83 (8th Cir. 1978). Counsel for the named plaintiffs claim that (1) the amount of the settlement fund, $1.5 million, is inadequate; (2) there is no guarantee that Sperry will comply with the injunctive relief mandated by the settlement; and (3) named plaintiffs were denied due process rights by the settlement procedures.

This settlement is no different than others in that it is a compromise. And compromises rarely are completely satisfactory to all parties involved. A significant number of class members have indicated their disapproval with the proposed settlement. Of the 30 class members who testified concerning their opposition, however, many voiced grievances unrelated to the subject matter of this lawsuit. The objections of those who did testify concerning the settlement were articulate and well-reasoned, and the Court appreciates their assistance.

Considering the likelihood that plaintiffs would prevail at trial and the range of possible recoveries if the plaintiffs were to prevail, the Court is of the opinion that the proposed settlement is fair, reasonable and adequate. It must be approved. Plaintiffs presented evidence indicating that their case, or at least a portion of it, was relatively strong. Defendants, however, were successful in exposing several weaknesses in the plaintiffs' case and defendants' experts have exposed further weaknesses, particularly in the plaintiffs' allegations that are the basis for much of the damage claims. Granted, the settlement may not be the perfect solution for all, or perhaps any, of the parties. But upon evaluating the strengths and weaknesses of the plaintiffs' case and the probable evidence which the defendants would have offered at trial, it becomes clear that the result reached via the settlement route is a proper and appropriate one.

This lawsuit has traveled a long and often arduous path. Costs have been extremely high and further trial will likely exacerbate the already high expenses. It is the opinion of the Court that the amount of the proposed settlement fund is adequate, and the distribution system is fair. While the amount is not what plaintiffs sought, it is surely not an insignificant award and there is a risk, were the case to continue, that plaintiffs would not be successful and would not recover any damages. In addition, the value of the injunctive relief provided in the agreement and the changes that already have occurred at Univac as a result of this lawsuit are substantial. Although it may not be necessary, the Court will retain jurisdiction over the case to ensure that there is compliance with the terms of the settlement. The Court has examined very carefully the allegations concerning the negotiations leading up to settlement and found nothing improper. Just as during trial, the interests of the class were vigorously and excellently represented by counsel for the class.

The plaintiffs have achieved a great deal in this lawsuit. They have substantially corrected what they alleged to be serious violations of federal employment discrimination laws and, as a result of the settlement, have received some financial recompense. This final settlement of the differences of the parties is a good one and it must therefore be approved.

In addition to the monetary relief, plaintiffs have obtained equalization of the general labor and assembler wage rates, promotion procedures for lead persons, equalization of the ADMO and PMO wage rates, provision for promotion outside the bargaining unit, job analysis requirements, and other relief set out in the settlement agreement.

The Petition by class counsel for approval of an award of attorneys' fees in the amount of $500,000 and costs in the amount of $350,000 is reasonable, agreed upon by the parties, and will be approved by the Court. In the view of the Court, counsel for the class performed exceptionally well throughout the difficult trial, and the agreed upon amount of $500,000, approximately 80% of the amount counsel would have charged based on their hourly fees, is well justified. The Court appreciates the fact that the parties agreed upon the attorneys' fees in the settlement.

As of July 22, 1981, the sum of $365,037.41 had been paid by the two plaintiff law firms for costs and expenses in the litigation. Included were payments to experts who prepared reports and testified in plaintiffs' part of the trial. Payments were made to Analytics, Inc., of $204,961.31, to Richard Strachan of $63,867.14, and to PDRI of $34.263.97. The settlement agreement of May 20, 1981, and the notice to the class stated that costs and expenses of $350,000 would be paid to the two plaintiffs' law firms.

Analytics, Inc., has filed what purports to be a Notice of Appearance and Claim against Settlement funds for an additional amount of $35,359.46. This claim is in addition to the $204,961.31 already paid by plaintiffs' counsel to Analytics. The additional claim involves a dispute between plaintiffs' counsel and Analytics and if the dispute continues should be the subject of a separate lawsuit. The additional claim is denied.

The two named plaintiffs did not prevail in their challenge to the proposed settlement and thus their claim for attorneys' fees does not qualify under the applicable statute. The two named plaintiffs' request for attorneys' fees is based on a common benefit theory which is unsupportable. The request must be denied.

Based on the memoranda submitted by the parties, the oral submissions at the hearings, the objections filed with the Court, and the record of this entire lawsuit including the trial of some seven weeks, the Court finds that the settlement is fair, adequate, and reasonable.

IT IS ORDERED THAT:

1. The Petition of plaintiffs and defendants for an Order approving the Stipulation of Settlement of this case be, and hereby is, granted.

2. The Petition of named plaintiffs opposing the Stipulation of Settlement be, and hereby is, denied.

3. Attorneys' fees and costs be awarded to counsel for the class in the amount of $850,000.00.

4. The request for attorneys' fees and expenses by the objecting named plaintiffs against all three defendants be, and hereby is, denied.

5. The claim of Analytics, Inc., for $35,359.46 against the settlement funds be, and hereby is, denied.

6. Pursuant to paragraphs 6 and 18 of the Stipulation of Settlement defendant Sperry Rand (Univac) will deposit $1,500,000.00 in a settlement fund and $850,000.00

in an attorneys' fees and expense fund, each to bear interest in accordance with the stipulation.

7. Settlement payments to class members pursuant to paragraph 9 of the Stipulation of Settlement will be made by check issued by Sperry Rand (Univac) within 30 days after final disposition by the Court or Courts of the Order approving the settlement of the Class Action and the time for appeal has expired.

August 11, 1981.

/s/ Earl R. Larson
United States Senior District Judge

Appendix D

United States Court of Appeals
For The Eighth Circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

June 23, 1982

Ms. Donna L. Roback
and Ms. Judith M. Wolf
Mr. David S. Doty and
Ms. Sally A. Johnson
Mr. James T. Hansing
Messrs. J. Richard Bland
and Bradley M. Jones
Mr. Richard A. Williams, Jr.
Messrs. Hyman Edelman and
William Z. Pentelovitch

Re: 81-1977/95 Delores Elliott, et al v. Sperry Rand Corp., et al

Dear Counsel:

Enclosed is a copy of the opinion of this Court filed today in the above case. Judgment in accordance with the opinion is also entered today.

Please consult the appropriate Federal Rules of Appellate Procedure and the Eighth Circuit Rules (15 & 16) for post-opinion procedure, particularly circuit Rule 16 (d).

Sincerely,

Robert D. St. Vrain
Clerk of Court

enc.
lkl

cc: Hon. Earl R. Larson, Senior Judge
Mr. Robert E. Hess, Clerk-Minneapolis
4-74- Civ 627

United States Court of Appeals
For The Eighth Circuit

Appeal and Cross-Appeal from the United States District Court for the District of Minnesota.

No. 81-1977

Delores Elliott, Helen Ambrose and all other persons similarly situated,

Appellants,

v.

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Appellees.

No. 81-1955

Delores Elliott, Helen Ambrose and all other persons similarly situated,

Appellees,

v.

Sperry Rand Corporation, a Delaware corporation,

Appellant,

International Brotherhood of Electrical Workers, AFL-CIO and Local Union No. 2047 of the International Brotherhood of Electrical Workers.

Submitted: May 17, 1982
Filed: June 23, 1982

Before BRIGHT and McMILLIAN, Circuit Judges; and HARRIS, Senior District Judge.*

PER CURIAM.

Named plaintiffs-appellants Elliott and Ambrose objected to the proposed settlement of a class action alleging sex discrimination by the Sperry Rand Corporation (Sperry Rand) and appeal from the district court's order approving the settlement, awarding attorneys' fees to class counsel, and denying them attorneys' fees. Sperry Rand cross-appeals from the district court's ruling that the class, not Sperry Rand, receive interest on the settlement fund which Sperry Rand has deposited separately pending distribution to the class. We affirm in part, reverse in part, and remand for a determination and award of attorneys' fees to the named plaintiffs.

---

*OREN HARRIS, United States Senior District Judge, Eastern and Western Districts of Arkansas, sitting by designation.

Delores Elliott, Helen Ambrose, and Roberta Pettit initially brought this action against Sperry Rand, the International Brotherhood of Electrical Workers, and Local Union No. 2047, alleging sex discrimination in employment, in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.* The district court, the Honorable Earl R. Larson presiding, certified this case as a class action on May 27, 1976. This court denied Sperry Rand's petition for a writ of mandamus seeking decertification of the class in *Sperry Rand Corporation v. Larson,* 554 F.2d 868 (8th Cir. 1977).

Trial began on September 8, 1980, and continued through October 24, 1980, when plaintiffs rested their case. Before resumption of the trial scheduled for January, 1981, the parties entered into serious settlement negotiations. Elliott and Ambrose, the named plaintiffs, became dissatisfied with the course of these negotiations, and as a result, retained separate counsel in April 1981. The parties, however, reached agreement in May 1981, and class counsel, along with counsel for the defendants submitted a stipulated settlement to the district court for approval.

On July 27, 1981, the district court held a hearing on the fairness of the proposed settlement. Seven hundred and ninety class members, including the named plaintiffs, filed objections to the stipulated settlement.[1] Approximately thirty class members testified in opposition to the settlement. Elliott and Ambrose appeared at this hearing to voice their objection to the settlement and were represented by separately retained counsel.

---

[1] The total class consisted of approximately 3,000 members. The vast majority approved the settlement.

The district court entered an order on August 19, 1981, approving the settlement, which provides $1.5 million as monetary relief for past discriminatory practices of Sperry Rand, and awards $850,000 in attorneys' fees and costs to class counsel. At the same time, the district court denied attorneys' fees to the named plaintiffs. In a separate order dated August 21, 1981, the court ruled that the interest on the $1.5 million settlement fund should accrue for the benefit of the class members, not Sperry Rand.

On appeal, Elliott and Ambrose contend that the district court abused its discretion in approving the stipulated settlement. Specifically, they argue that the settlement provides inadequate financial relief, fails to correct discriminatory practices, provides inadequate procedures for enforcement, and was negotiated in violation of their rights to due process.

We consider appellants' contention in light of the following standard:

> Our review of the settlement approved by the district court in this case is guided by the principle that:
>
> > Such a determination is committed to the sound discretion of the trial judge. Great weight is accorded his views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.

> Act Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 34 (3d Cir. 1971). Only upon a clear showing that the district court abused its discretion will this court intervene to set aside a judicially approved class action settlement. [*Grunin v. International House of Pancakes,* 513 F.2d 114, 123 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975).]

Judge Larson presided over this case from its inception, listened to seven weeks of trial testimony, and reviewed numerous exhibits and depositions. After listening to objections and assessing the strengths and weaknesses of plaintiffs' case, he concluded that the settlement reached was fair, reasonable, and adequate. Appellants have not clearly demonstrated that the district court abused its discretion in approving this settlement.

Elliott and Ambrose also object to the award of attorneys' fees, costs, and expenses to the law firm of Hvass, Weisman and King (the Hvass firm). Elliott and Ambrose claim that an award to the Hvass firm is unwarranted because that firm had withdrawn as class counsel because of a potential conflict of interest and later came back into the suit without notice to, or authorization by, the named plaintiffs.

Elliott and Ambrose, however, cite no authority for their argument that a law firm, which withdraws and later reenters a class action, may not recover its costs, expenses, and fees. Nor do they assert that the Hvass firm's participation as counsel for the class represented an actual conflict of interest, or that the amount of the fees awarded was unreasonable. On the record presented, we cannot say that the district court abused its discretion in awarding the attorneys' fees for which the stipulated settlement provided.

We disagree, however, with the court's order denying attorneys' fees to the named plaintiffs. At oral argument, counsel for the class plaintiffs acknowledged that the named plaintiffs required separate representation because their interests had diverged from those of the class. By their participation at the settlement hearing, the named plaintiffs contributed to the adversarial nature of the proceedings, *see Frankenstein v. McCrory Corporation,* 425 F. Supp. 762, 767 (S.D.N.Y. 1977), and provided representation for a significant group of objectors. Moreover, these individuals are not simply dissenters, but the plaintiffs who initially brought this action. Accordingly, they deserve some compensation for their attorneys' fees. This compensation, however, must come out of the fund ($850,000) set aside for attorneys' fees by the stipulated settlement. On remand, the district court in its discretion shall determine an appropriate award of attorneys' fees for the named plaintiffs taking into consideration time spent and other relevant matters, including the value of those services in proceedings leading to approval of the settlement.

Finally, Sperry Rand argues that the district court incorrectly awarded the interest accruing on the $1.5 million settlement fund to the class members. After approving the settlement, the district court determined that this money no longer belonged to Sperry Rand. The court reasoned that if the distribution of funds had not been delayed by this appeal, the individual class members would have been in a position to invest the money and claim the interest. We agree with this reasoning and accordingly affirm the court's order awarding the interest from the settlement fund to the class members. *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 162 (1980) (interest on interpleaded fund allocated to those who ultimately own the principal).

In sum, we affirm the orders of the district court approving the settlement and awarding interest on the settlement fund to the class members, but reverse the order denying attorneys' fees to the named plaintiffs. We remand the case to the district court for a prompt determination of the amount due the named plaintiffs for attorneys' fees, which will be awarded out of the fund set aside for the attorneys' fees of the class.

A TRUE COPY.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Appendix E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, et al

Plaintiff,

vs.

Sperry Rand Corporation, et al

Defendant.

No. 4-74 Civil 627

Clerk's Notice under Rule 77 (d) F. R. Civil Procedure
or
Rule 49 (c) F. R. Criminal Procedure

You are hereby notified that in the above-entitled cause, on the 3rd day of August, 1982 we filed Judge Larson's Order that Judgment will be entered for named plaintiffs Delores Elliott and Helen Ambrose in the amount of $20,-000.00 for attorneys' fees and in the amount of $601.77 for costs, said sums to be paid by the law firms of Meagher, Geer, Markham, Anderson, Adamson, Flaskamp & Brennan and Hvass, Weisman & King from the fund of $500,000.00 awarded to the two law firms as part of the overall settlement and we entered judgment accordingly.

ROBERT E. HESS, CLERK
By: ——————————
Deputy Clerk

Meagher, Geer Law Firm
J. Richard Bland & Bradley M. Jones
2250 IDS Center
Minneapolis, MN 55402

Hvass, Weisman & King
Richard A. Williams, Jr.
715 Cargill Bldg.
Minneapolis, MN 55402

Donna L. Roback & Judith M. Wolf
1624 Harmon Place, Suite 209
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Steward C. Loper
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1800 Midwest Plaza Bldg.
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, and all other persons similarly situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

---

ORDER

No. 4-74-Civ. 627

This Court in September and October 1980 heard the plaintiffs' sex discrimination case. The trial was adjourned to January 1981 for presentation of the defendants' defense. Defendants' part of the case would have required another two to four weeks of trial time with substantial additional expense to the litigants. The trial in September 1980 was preceded by much discovery, many motions and hearings, and an earlier appeal to the Court of Appeals relating to this Court's certification of a class.

After October 1980 counsel for the named and class plaintiffs and counsel for Sperry Rand entered into settlement negotiations. The resumption of the trial scheduled for January 1981 was continued pending further settlement discussion. Named plaintiffs Elliott and Ambrose became dissatisfied with the course of the negotiations and retained separate counsel—Donna L. Roback and Judith M. Wolf—in April 1981. In May 1981 class counsel and counsel for defendants submitted a stipulated settlement for Court approval. The settlement agreement provided for the payment by Sperry Rand of 1.5 million dollars, together with injunctive relief which had substantial value but which is difficult to measure in dollars. Sperry Rand also agreed to pay $500,000.00 in attorneys' fees to class counsel and agreed to reimburse class counsel for $350,000.00 advanced by class counsel in large part for expert witness services and fees.

In July 1981 this Court held a hearing on the fairness, adequacy and reasonableness of the settlement and in August 1981 entered its Order of approval of the settlement. In a separate hearing this Court approved the fees and reimbursement of expenses for class counsel.

The Court of Appeals on June 23, 1982, affirmed this Court's Orders approving the settlement and awarding interest on the settlement fund to the class members but reversed the Order denying attorneys' fees to the named plaintiffs and ordered that the attorneys' fees to named plaintiffs be paid from the funds set aside for the attorneys' fees for the class.

The Court of Appeals in its Opinion stated that counsel for the named plaintiffs by their participation at the settlement hearing contributed to the adversarial nature of the proceedings and provided representation for a significant number of objectors. This Court was directed in its discretion to determine an appropriate award of attorneys' fees for the named plaintiffs, taking into consideration time spent and other relevant matters, including the value of those services in proceedings leading to approval of the settlement.

Counsel for named plaintiffs have petitioned the Court for an award of $11,460.00 for 191 hours at $60.00 an hour for services prior to this Court's decision on August 11, 1981, approving the settlement, together with costs of $93.98, and for an award of $14,454.00 for 240.9 hours at $60.00 an hour for services after August 11, 1981, for the appeal and the preparation of the fee petition and hearing, plus costs of $507.79 incurred after August 11, 1981. The preparation of the fee petition and the hearing required 20 hours of time. Counsel for named plaintiffs have also asked for a multiplier of .5 to be applied to the fees in the amount of $12,957.00. The total fee request is therefore $38,871.00. Named plaintiffs' counsel describes the multiplier as a bonus incentive fee award.

Counsel for the named plaintiffs have filed a detailed statement of hours and expenses. Attorney Roback is a 1979 graduate of the University of Minnesota Law School and Attorney Wolf is a 1980 graduage of the same Law School. Both have been in private practice since admission to the Bar, and prior to April 1981 appear to have had some experience in the area of employment discrimination.

Counsel for named plaintiffs have collected an unknown amount of money from the objectors. They have stated that this money would be returned to the objectors.

Counsel for the class are the law firms of Meagher, Geer, Markham, Anderson, Adamson, Flaskamp & Brennan and Hvass, Weisman & King. The have specified objections to the proposed named plaintiffs' claims. They state that the Court of Appeals provided for the value of services in leading to the approval to the settlement and this means the services prior to the August 11, 1981 Order of this Court. The settlement, however, was not final until affirmed by the Court of Appeals. Named plaintiffs did not ask the Court of Appeals for attorneys' fees for services on the appeal. This Court assumes that the Court of Appeals left it to this Court to determine the amount of fees for all services, including the appeal and preparation of the fee petition.

Class counsel object to the bonus incentive of 50% and to certain hours for claimed services and the hourly rate of $60.00. The Court of Appeals for this Circuit has approved the decision in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), and the various factors to be taken into consideration.

The factors to be considered in *Johnson* are:

1. Time and labor. The hours and rates have been previously noted.
2. The novelty and difficulty of the issues presented. The issues were not particularly novel or difficult.
3. Requisite skill. Named plaintiffs' counsel had previous experience in the area of employment discrimination.
4. Preclusion of other legal work. Not a factor.
5. Customary fees. The claimed hourly fee may be excessive but possibly can be justified.
6. Contingency fee. Unknown. Named plaintiffs' counsel had collected money from objectors in an unknown amount which is to be returned to the objectors.

7. Time limitations. None were apparent.

8. Amount involved and recovery obtained. This Court approved the settlement negotiated by class counsel and the Court of Appeals affirmed. The amount was substantial but the named plaintiffs did not effect the settlement. In *Brown v. Bathke,* 588 F.2d 634 (8th Cir. 1978), the Court of Appeals stated that the District Court may consider, as one factor, the relief which named plaintiffs obtained in the case as a whole, citing *Johnson.* The plaintiffs obtained no relief except for a remand for a determination of their attorneys' fees. They did, however, present the claims of the 790 objectors, of whom 30 testified. As suggested by counsel, they made possible what can be described as a "due process" hearing.

9. The experience and reputation of the attorneys. This has been referred to previously.

10. Undesirability of the case. The undertaking was likely undesirable in view of extensive pretrial and trial and negotiations and this Court's likely approval of a settlement negotiated by competent counsel over an extended period of time.

11. Nature of plaintiffs and client relationship. Appears not to be applicable.

12. Awards in similar cases. This Court has had previous experience in determining fees in class action cases, but has had no experience in a matter comparable to the problem presented here.

This Court has not detailed the objections of class counsel which are directed to specific items of services and hours detailed in named plaintiffs' counsel's affidavits. Some objections appear to have merit. Class counsel state that fees of only $3,510.00 prior to August 11, 1981, and $5,097.00 after August 1981 can be supported or justified.

The Court believes that no "lodestar" bonus for contingency, ability or incentive or otherwise has been substantiated or can be reasonably justified.

In view of the limited success as noted by this Court and the Court of Appeals, this Court believes that an award of $20,000.00 to named plaintiffs is fair and reasonable. This award includes all claims for attorneys' fees in this case. There may be several minor problems yet to be resolved, but counsel for the class and counsel for Sperry Rand can work these out. A further hearing may be necessary. Sperry Rand will bear the burden of resolving these problems.

Judgment will be entered for named plaintiffs Delores Elliott and Helen Ambrose in the amount of $20,000.00 for attorneys' fees and in the amount of $601.77 for costs, said sums to be paid by the law firms of Meagher, Geer, Markham, Anderson, Adamson, Flaskamp & Brennan and Hvass, Weisman & King from the fund of $500,000.00 awarded to the two law firms as part of the overall settlement.

August 3, 1982.

/s/ Earl R. Larson
United States Senior District Judge

Appendix F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, and all of the persons similarly situated,

Plaintiffs

vs.

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

STIPULATION

4-74 Civ. 627

The parties hereto, through their respective counsel, hereby stipulate and agree as follows:

1. Pursuant to the Settlement Agreement executed by the parties and approved by the Court, the attached list of Class members eligible to receive distributions and the amount each should receive has been compiled; and

2. Class members have been afforded an opportunity to review and correct that portion of the list which included their names, current addresses, dates of employment and entitlement to points under the formula set forth in the Settlement Agreement; and,

3. The parties, through their respective counsel, have examined the attached list of class members eligible to receive disbursements from the class action settlement fund which, upon October 1, 1982, will equal ONE MILLION SEVEN HUNDRED FIFTY-SIX THOUSAND FOUR HUNDRED NINETY-SEVEN AND 15/100 ($1,756,497.15) DOLLARS; and

4. The parties, through their respective counsel, have reviewed the underlying documentation and have agreed to the resolution of various questions concerning the eligibility of certain individual class members; and therefore,

IT IS HEREBY STIPULATED and agreed that the Court may issue an Order approving distribution of the settlement funds to Class members identified on the attached list, and in the amounts specified thereon, as full and complete satisfaction of the payment required under the Settlement Agreement.

Dated: September 28, 1982.

MEAGHER, GEER, MARKHAM, ANDERSON,
ADAMSON, FLASKAMP & BRENNAN
and
HVASS, WEISMAN & KING
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Attorneys for Named Plaintiffs
Delores Elliott and Helen
Ambrose

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, and all of the persons similarly situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

ORDER
4-74 Civ. 627

WHEREAS, as a condition of settlement of this case, defendant Sperry has agreed to pay to identified Class members an amount computed in accordance with a formula contained in the Settlement Agreement approved by the Court; and

WHEREAS, the parties, through their counsel, have stipulated that the list supplied to the Court contains the names of those Class members that can be determined to be eligible to receive a payment, and the amount of that payment; and,

WHEREAS, as of October 1, 1982, the settlement fund to be distributed will equal ONE MILLION SEVEN HUNDRED FIFTY-SIX THOUSAND FOUR HUNDRED NINETY-SEVEN AND 15/100 ($1,756,497.15);

IT IS HEREBY ORDERED:

That the payments to Class members set forth on the class list supplied to the Court are hereby approved to be made as compliance with previous order of the Court.

Dated: September 28, 1982.

/s/ Earl R. Larson
Senior District Court Judge

Appendix G

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, and all of the persons similarly situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

ORDER

4-74-Civil-627

Defendant Sperry Rand Corporation (Sperry) has moved for an Order for Judgment dismissing the action as to all parties and discharging the parties from the supervisory jurisdiction of this Court.

The Court held 3 hearings in December 1983 and since then has considered various affidavits, letters and memoranda which have been submitted to the Court.

On August 11, 1981 the Court entered an Order approving the Stipulation of Settlement which had been entered into by the parties on May 20, 1981. The Court also determined that the Settlement was fair, adequate and reasonable. The Court of Appeals on June 23, 1982 affirmed this Court's determination.

The Court finds that the parties have complied with the Stipulation and this Court's Orders. Sperry has paid the class members \$1,762,618.47. The sum of \$1,794.67 remains unclaimed in the settlement fund. Sperry has also complied with the Court's Order relating to the payment of attorneys fees and costs to class counsel. In addition Sperry and the Local Union have modified the collective bargaining agreement as agreed to. Sperry has furnished to the Court the Hays studies, has established appropriate jobs in Plating and Electro-Mechanical areas for assemblers, has established selection criteria for first line supervisors, has encouraged employees to avail themselves of its tuition reimbursement program and has provided notice to employees of the criteria for promotion to various jobs.

IT IS HEREBY ORDERED THAT:

1. The action is dismissed in all its counts and claims as to all parties with prejudice.

2. Class members are barred and enjoined from prosecuting any other action involving the claims of the class action complaint and defendants are barred and enjoined from prosecuting any action against a class member arising from a claim embraced in the class complaint or for defense costs or fees.

3. The parties be discharged from the supervisory jurisdiction of this Court arising from the previous Orders of this Court, the Stipulation of Settlement and the power granted to the Court by Rule 23 relating to class actions.

4. Sperry pay to 5 employees or former class members employees—Axtell, Turnipseed, Alice Olson, Silva and Julia F. Turner—the amounts due them upon proof of membership in the class and their entitlement to payment.

5. Sperry within 10 days pay the sum of $1,794.67 into the Clerk's registry fund. The list of 22 class members and the amounts due them is Attachment 1 to the Achterhof Affidavit (Clerk's Folder IX-1). Sperry will within 15 days file with the Clerk a supplemental list which will include first names, the most recent address and any other identifying information. Payment to the class members will be made by the Clerk upon the submission of a claim and proper proof. After 5 years the Clerk will remit the balance remaining in the fund to the Treasurer of the United States.

Let Judgment be Entered Accordingly.

May 31, 1984.

Separate Memorandum Filed

/s/ Earl R. Larson
United States Senior District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, and all of the persons similarly situated,

Plaintiffs.

vs.

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

ORDER

4-74-Civil-627

Helen M. Ambrose as Pro Se Plaintiff filed a motion on January 3, 1984 to Invalidate Settlement and to Stay Order for Judgment. The motion also requests the Court to set aside previous findings, opinions and judgments, to permit further discovery, and for a new trial on all issues at trial and in settlement. The motion suggests an actual conflict of interest held by the Hvass law firm which acted as co-counsel for the plaintiff class.

The Court has considered the motion, affidavit, memoranda and letters, and the claims and arguments of the parties.

The Court refers the parties and counsel to the separate Memorandum to be filed.

IT IS ORDERED:

That the motion be denied.

May 31, 1984

/s/ Earl R. Larson
United States Senior District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, and all of the persons similarly situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

4-74-Civil-527

MEMORANDUM

Defendant Sperry Rand (Sperry) filed a motion on November 29, 1983 for an Order dismissing this action with prejudice, and discharging the parties from jurisdiction on the ground that defendants have fully complied with the terms of the Stipulation of Settlement approved by this Court on August 11, 1981.

The Court heard evidence submitted by the class plaintiffs for almost seven weeks in September and October of 1980. The Court granted defendants motion to continue the trial to January 1981. After the recess in October 1980 the parties and their counsel began serious discussions about a possible settlement and on May 20, 1981 a Stipulation of Settlement was entered into. The settlement was agreed to by counsel for the class, the Meagher, et al and the Hvass, et al firms, and counsel for the 3 defendants, including Sperry, the International Union and the Local Union.

The case has had an extended history. The complaint was filed in late 1974 and extensive discovery followed.

On May 27, 1976 this Court conditionally certified the Title VII claim for class action status under Rule 23 (b) (2).

Sperry challenged the Court's finding in a mandamus petition, claiming that the named plaintiffs would not or could not fairly and adequately represent the class (Rule 23(a) (4)), in effect claiming a violation of due process. Sperry claimed 5 sources of antagonism between the named plaintiffs and the class members.

The Court of Appeals in *Sperry Rand vs. Larson,* 554 2d 868 (1977) denied the petition for a writ of mandamus to compel decertification.

After a later motion by Sperry to decertify the class this Court in *Elliott vs. Sperry Rand,* 79 FRD 580 (1978) again discussed the possible antagonism between the named plaintiffs and the putative class members but decided again to conditionally certify the class.

After notice to the class members the Court held hearings on July 27 and July 30, 1981. The July 27 hearing was directed to the fairness, adequacy and reasonableness of the settlement. A number of class members objected to the settlement and a number of objectors were heard. The July 30 hearing related to approval of attorneys' fees and the reimbursement to class counsel for costs and expenses. At the July 30 hearing there was objection to the payment of attorneys' fees for the class co-counsel Hvass firm on the ground of a possible conflict of interest. No testimony was offered as to an actual conflict of interest. The explanation provided by attorneys Bland, Williams and Hansing were adequate and satisfactory. The Court finds that there was no actual conflict of interest and no collusion or unethical conduct which affected the trial or the settlement. On August 11, 1981 the Court determined that the settlement was fair, adequate and reasonable and approved class counsels' fees and reimbursement of costs and expenses.

The named plaintiffs objected to the settlement and appealed from the Court's Order approving the settlement as fair, adequate and reasonable. Named plaintiffs also objected to the award of attorneys' fees and expenses to the Hvass firm and to the non-award of attorneys' fees to newly retained counsel for the named plaintiffs.

The Court of Appeals on June 23, 1982, *Elliott v. Sperry Rand,* 680 F.2d 1225, affirmed this Court's approval of the fairness of the settlement. The Court noted the objection to the award of fees and expenses to the Hvass firm on the ground that the Hvass firm had withdrawn as class counsel and then later reappeared as co-class counsel with the Meagher firm. This Court's recollection is that at some point in time during the 7 week trial attorney Williams of the Hvass firm appeared at the trial and examined witnesses and participated in the settlement negotiations. The Court understands that attorney Hvass participated in the settlement negotiations. This Court does not recall any objection by the named plaintiffs during the trial and thereafter (until December 1983) to participation of the Hvass firm in the trial or the settlement negotiations.

The Court of Appeals also noted at page 1227 that the named plaintiffs did not assert that the participation of the Hvass firm represented an actual conflict of interest or that the amount of the fees awarded was unreasonable.

This Court on September 28, 1982 approved payment of the settlement fund to the class members which on October 1, 1982 totalled $1,756,497.15.

So much for some of the history.

Sperry has supported its motion by affidavits from its chief counsel, David S. Doty, Trudy P. Achterhof (employed by Sperry) and Maggie J. Anderson (employed by the Doty law firm). The Doty affidavit recites various provisions of the Settlement Agreement and this Court's Order and states that there has been compliance. The Achterhof affidavit recites her participation in determining the names of the employees on the class lists and in generating the checks in October 1982 to 3,105 class members in the total amount of $1,762,618.47. In October 1983 she verified a list of 22 checks 18 of which had been returned to Sperry and are in Sperry's possession and 4 of which have not been returned but have not been cashed. The uncashed checks total $1,794.57. The Anderson affidavit recites her efforts and the efforts of other personnel in the law firm in determining the pay out lists.

The Court held hearings on December 6, 12, 27, 1983. Letters, Memoranda, etc., were received through April 4, 1984.

The December 6 hearing was directed primarily to the posting of notices for first line supervisors. Sperry hired 3 males as associate engineers and they may have performed some of the duties of first line supervisors. Sperry claims that there was a misunderstanding in the department. There is also a suggestion of antagonism involving the manager of the department and the Local Union. In any event, it is clear that the misunderstanding has been corrected. If not by now corrected Sperry has agreed to arbitrate the dispute assuming that the dispute still continues.

The December 12, 1983 hearing related in part to the first line supervisor dispute and to that part of the settlement agreement relating to 2 Hay reports. One report was directed to a Job Analysis of Skilled Jobs and the other report was directed to Job Analysis for Bargaining Unit Supervisors. The settlement agreement provided for submission of the 2 reports to the Court only. The 2 reports were given to the Court in compliance with the settlement agreement.

The December 27, 1983 hearing was devoted substantially to comments by the Court, Ms. Ambrose and counsel. Witness Hodder testified and witness Globa testified briefly again.

Ms. Ambrose stated that 5 class members had not been paid. Two of the 5 (Axtell and Turnipseed) received notices but did not respond. Mr. Doty stated that if the 5 were properly members of the class and should receive checks that Sperry would pay them.

There was discussion as to a merger of the move crew and the general laborer class. Mr. Globa's position is that the two have always been one class though at one time there was a 5 cent an hour differential. The Court believes that the settlement agreement and this Court's Order have been complied with.

There was further discussion as to what is a department as opposed to a work center, access to the Hays reports, the relationship of Teamsters Local 970, a small bargaining unit at Sperry, and Local IBEW 2047 (one of the defendants).

If there are continuing problems as to uncertainties or otherwise relating to the settlement agreement they can likely be raised in grievance proceedings, collective bargaining negotiations or proceedings before administrative bodies.

There was suggestion of a conflict of interest involving the Hvass firm. The claimed conflict was not raised in this Court during the extended trial and the settlement negotiations nor in the Court of Appeals. Ms. Ambrose agreed that the claimed conflict of interest had not been raised except for payment of attorneys fees to class counsel which included the Hvass firm.

Following the 3 hearings in December 1983 Ms. Ambrose, one of the 2 named plaintiffs and now a pro se plaintiff, filed a motion on January 3, 1984 to Invalidate the Settlement and to Stay Order for Judgment. The motion states that it is brought pursuant to Rules 58.02, 59.02 and 60.02 and to "exercise" Rule 59.05 and set a hearing date. The motion also asks the Court to "exercise" Rule 6 to set aside previous findings, judgments, to permit further discovery, and new trial on all issues at trial and in settlement that may reasonably be tainted or damaged by a conflict of interest of the Hvass firm acting as associate counsel for the class plaintiffs. Plaintiff Ambrose filed an affidavit in support of her motion and in that affidavit referred to an earlier affidavit of December 21, 1983.

The Ambrose affidavit of December 21, 1983 relates to the performance of certain kinds of work, her disagreements with counsel and the claimed conflict of interest of the Hvass firm. Attached to her affidavit is extensive documentation consisting of an exchange of letters between named plaintiffs and the Ethics Committee (Committee) of the Hennepin County Bar Association.

The Committee concluded its investigation on December 2. 1982 and decided that there had been no ethical violation and dismissed the complaint. The Committee shortly thereafter forwarded its file and recommendation to the Lawyers Professional Responsibility Board (Board). On March 29, 1982 the Board advised the 2 named plaintiffs that the Board concurred in the recommendation of the Committee that the complaint be dismissed and closed its file.

The Ambrose affidavit of January 3, 1984 refers again to the claimed conflict of interest and the co-mingling of certain work tasks. The Ambrose affidavit of March 16, 1984 refers to a seniority roster in 2 positions and again to job postings for first line supervisory positions. The Ambrose affidavit of March 20, 1984 refers to job information forms. inspection test equipment, job classification and attaches various documents.

The affidavits of attorneys Bland and Jones of the Meagher firm dated February 13, 1984 state that the named plaintiffs were advised of the re-entry of the Hvass firm through pleadings, correspondence and discussions with named plaintiffs shortly after the re-association occurred.

In summary it appears that defendant Sperry has complied with the settlement agreement and with the Orders of this Court. The Court has referred earlier to the 2 more seriously disputed issues. One relates to the posting of first line supervisory positions. It appears that there was a misunderstanding and that this has been corrected. If not corrected Sperry has agreed to arbitrate any dispute which remains. The second relates to the 2 Hays reports which, pursuant to the settlement agreement were to be provided to the Court. The Local Union and perhaps the named plaintiffs would like access to the reports. The settlement agreement in this respect was complied with. Named plaintiff Ambrose refers to other possible minor problems. As suggested these can and should be resolved in grievance procedures, arbitration or by administrative agencies.

Named plaintiff Ambrose has cited a number of Rules. Basically she wants a new trial because of the claimed conflict of interest. The Court has participated in the various proceedings from the date of the filing of the complaint in 1974 to the present. The Court can find no conflict of interest and agrees with the determination of the Ethics Committee and the Board that the ethics complaint should be dismissed.

Class counsel including the Meagher and Hvass firms did an excellent job. They introduced expert innovative testimony of industrial psychologists and others. Ambrose suggests some minor disagreement with trial strategy. In any trial such hindsight criticism can be expected. The burden and cost of a possible 12 week retrial cannot be justified.

The management problems are considerable. New class counsel would have to be retained. Class members could be asked to return the $1,7000,000 plus paid to them. There is always the possibility that after the presentation of defendants' case that no money judgment would be returned. The injunctive relief which had substantial value to the class might require vacation. The Clerk's files are contained in 11 boxes of exhibits, depositions, transcripts, etc. The boxes are 12 by 12 by 18 inches in size. Successor counsel would have to review all or much of this material.

After 10 years the entire matter should be put to rest.

May 31, 1984.

/s/ Earl R. Larson
United States Senior District Judge

1

Appendix H

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, and all of the persons similarly situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

ORDER
4-74-Civil-627

On May 31, 1984 I filed 2 Orders and a separate Memorandum.

One Order denied the motion of pro se plaintiff Ambrose to Invalidate Settlement, to Stay Order for Judgment and for a New Trial on all issues. The motion was based on a claimed conflict of interest of one of the law firms representing the named plaintiffs and the class.

A second Order granted the motion of defendant Sperry Rand for an Order dismissing the action as to all parties and discharging from further supervisory jurisdiction of the Court. In this Order I reviewed some of the history of the case and Sperry's compliance and also disposed of several minor matters.

The Memorandum reviewed the history of the litigation and made reference to a claim of possible conflict of interest on the part of the Hvass law firm. I stated that this claim was not raised during the extended trial or the settlement negotiations nor in the Court of Appeals.

On June 8, 1984 Ms. Ambrose filed a Motion for New Trial and Amendment of Judgments and stated that a supporting Memorandum and affidavits would be submitted within 20 days. The additional materials were submitted on July 18, 1984.

I will treat the June 8 motion as a Motion for Reconsideration of the May 31 Orders.

On June 8 Ms. Ambrose also filed a Notice of Appeal and on June 15 a notice to clerk to Transmit and Certify a Designated Record and Settlement of Issues.

I am also in receipt of an exchange of correspondence between Ms. Ambrose and attorneys Roback and Wolf, the latest attorneys to represent Ms. Ambrose.

The last Ambrose letter was received on August 27, 1984. The correspondence relates to a private dispute as to attorneys fees and will not be considered by me.

Though an appeal appears to be pending I will treat the latest motions as Motions for Reconsideration.

I have considered the Motions, Memorandu, Affidavits and Exhibits. No further hearing or argument is needed or would be productive.

Ms. Ambrose charges me with bias and fatigue. I deny the bias but admit the fatigue.

IT IS ORDERED:

1. That the June 8, 1984 Motion for New Trial and Amendment of Judgment be denied.

2. That the Motion for Reconsideration of the 2 May 31, 1984 Orders and Memorandum be denied.

September 10, 1984.

/s/ Earl R. Larson
United States Senior District Judge

Appendix I

United States Court of Appeals
For The Eighth Circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

March 11, 1985

Ms. Helen M. Ambrose
Mr. James T. Hansing
Mr. Steward C. Loper
Mr. J. Richard Bland
Mr. Frank Dosal, Clerk (Civ 4 74 627)

Mr. David S. Doty
Mr. Hyman Edelman
Mr. Richard A. Williams

Re: 84-5183 Helen Ambrose v. Sperry Rand Corp., et al

Counsel:

Enclosed is a copy of the opinion of this Court filed today in the above case. Judgment in accordance with the opinion is also entered today.

Please consult the appropriate Federal Rules of Appellate Procedure and the Eighth Circuit Rules (15 & 16) for post-opinion procedure, particularly Circuit Rule 16 (d).

Your attention is also directed to Federal Rule of Appellate Procedure 39 and Eighth Circuit Rules 7 (f) and 8 (j). Itemized and verified bills of coast are to be filed with this office with proof of service within 14 days from this date. We would appreciate it if counsel for the prevailing party would promptly forward to us an itemized bill of costs for the reproduction of the authorized number of copies of their briefs. If the prevailing party fails to submit an itemized bill of cost on a timely basis, this office will assume that the right to recoup costs has been waived. Itemized bills of cost which are not timely filed will not be processed without a special order of the Court. Similarly, objections to requested bills of cost must also be submitted on a timely basis—within 10 days of the bill of costs.

Your prompt attention to this request will be appreciated.

Sincerely,

/s/ Robert D. St. Vrain
Clerk of Court

mm
enc.

United States Court of Appeals
For The Eighth Circuit

Delores Elliott, Helen Ambrose,

Appellant,

Roberta Pettit, and all other persons similarly situated,

v.

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of The International Brotherhood,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

No. 84-5183

Submitted: February 12, 1985
Filed: March 11, 1985

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

PER CURIAM.

This appeal is from a May 31, 1984 order of the district court denying certain post-judgment relief following an approved settlement in a sex discrimination lawsuit brought against Sperry Rand Corporation, the International Brotherhood of Electrical Workers, AFL-CIO, and the local union. Appellant, Helen Ambrose, is an individual plaintiff who sought by a post-judgment motion and now seeks by this appeal to upset the approved settlement by her attack on the ethics, impartiality, conflict of interests, and fee award of certain counsel members of the Hvass law firm, who represented plaintiffs. The appellees contend the district court properly terminated the action by granting Sperry Rand's motion to dismiss with prejudice, thereby refusing to invalidate the settlement.

The voluminous record shows that the settlement was signed by the parties May 20, 1981, approved by the district court August 11, 1981, and affirmed by decision of this court filed on June 23, 1982. The eight-page memorandum of the district court dated May 31, 1984, which accompanied the appealed order now before this court, shows the district court considered and ruled on the claims of plaintiff-appellant, concluding defendant Sperry Rand had complied with the terms of the stipulated settlement agreement and that plaintiffs' counsel had done an excellent job. The court agreed with the conclusion of the Ethics Committee of the Hennepin County Bar Association and the Lawyers Professional Responsibility Board that the ethics complaint should be dismissed and found no conflict of interests. The district court noted Sperry Rand agreed to arbitrate any disputes which remain and mentioned one dispute over posting of first line supervisory positions and another over access to two reports. The court found the misunderstanding and dispute over those two matters had been resolved and opined that any other disputes could be resolved in grievance procedures, arbitration, or by administrative agencies.

The district court calculated the considerable risks to plaintiffs of starting the litigation over and concluded, "After 10 years the entire matter should be put to rest."

The standard of review of this approved settlement is whether the district court abused its discretion. *Elliott v. Sperry Rand Corp.*, 680 F.2d 1225 (8th Cir. 1982); *Reynolds v. National Football League,* 584 F.2d 280 (8th Cir. 1978). The thorough May 31, 1984 memorandum shows the district court diligently and carefully considered the attacks on the settlement and plaintiffs' counsel.

We find no indication that the district court abused its discretion. No error of law or fact appearing and it being clear that further expression by us would have no precedential value, the judgment of the district court is affirmed. *See* 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

Appendix J

United States Court of Appeals
For The Eighth Circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

May 13, 1985

Ms. Helen M. Ambrose
3528 27th Avenue South
Minneapolis, MN 55406

Re: No. 84-5183-MN Helen Ambrose vs. Sperry Rand Corp., etc., et al

Dear Ms. Ambrose:

Enclosed is a copy of an order entered by us today at the direction of the court.

Sincerely,

/s/ Michael E. Gans
Chief Deputy

MEG/cgj
Enclosure
cc: Mr. David S. Doty
Mr. James T. Hansing
Mr. Hyman Edelman
Mr. Stewart C. Loper
Mr. Richard A. Williams, Jr.
Mr. J. Richard Bland
Ms. Phyllis Farguharson, Court Reporter
Mr. Frank Dosal, Clerk, U.S. District Court
FOR INFO ONLY:
Honorable Earl R. Larson
(4-74-627)

United States Court of Appeals
For The Eighth Circuit

Helen Ambrose,

Appellant.

vs.

Sperry Rand Corp., etc., et al,

Appellees.

Appeal from the United States District Court for the District of Minnesota

No. 84-5183-MN

Appellant's motion for reconsideration or to vacate or modify orders and to prevent manifest injustice, having been considered by the court, is denied.

May 13, 1985

Appendix K

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose, and all other persons similarly situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware corporation, the International Brotherhood of Electrical Workers, AFL-CO., and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

STIPULATION OF SETTLEMENT
4-74 Civ. 627

THIS STIPULATION OF SETTLEMENT, entered this 20th day of May, 1981, among the parties to the above entitled action.

WITNESSETH:

WHEREAS, the individually named plaintiffs caused to be filed with the Equal Employment Opportunity Commission charges numbered TMK3-0617 and TPA3-0461 and related state charges, and said plaintiffs thereafter received Notice of Right to Sue letters dated September 12, 1974 and September 3, 1975; and

WHEREAS, the above entitled action was commenced by Delores Elliott and Helen Ambrose ("Named Plaintiffs") as a class action ("Class Action") in December, 1974 against the defendants Sperry Rand Corporation ("Univac"), International Brotherhood of Electrical Workers, AFL-CIO ("International") and Local Union No. 2047 of the International Brotherhood of Electrical Workers ("Local"), asserting claims for alleged violations of Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Labor-Management Relations Act, and for breach of contract; and

WHEREAS, the Class Action was certified as such by Order of the Court dated May 27, 1976 and as amended by Order of the Court dated July 12, 1978, defining the class as follows:

> "Those present and future female employees of defendant Univac employed at its plants in and near St. Paul, Minnesota, and who are or will be members of defendants Local and International, up until the date of trial; and those former female employees who were employed by defendant Univac at its plants in and near St. Paul, Minnesota, and who were members of defendants Local and International, on September 4, 1972 and thereafter." (hereafter referred to as "the Class").

WHEREAS, the defendants, and each of them, deny the allegations of the charges filed providing the basis for the Complaint, deny the allegations of the Complaint, deny all liability, and deny that the named plaintiffs or the class are entitled to any recovery; and

WHEREAS, trial in this matter commenced on September 8, 1980, before the Honorable Earl R. Larson and continued through the conclusion of plaintiffs' case on October 24, 1980; and

WHEREAS, Counsel for the Class deem it in the best interests of the Class to settle all and singular claims embraced and alleged in the charges filed with the EEOC and the Class Action Complaint herein on behalf of the Class in the manner and upon the terms and conditions hereinafter set forth, in order to buy universal peace, avoid further expense, inconveniences and distractions of burdensome and protracted litigation, and put to final rest the controversies and claims raised in the Class Action, and deem such settlement desirable and in the best interests of the Class; and

WHEREAS, the Defendants, and each of them, consider it desirable and in the best interests of all concerned to settle the entire Class Action and the controversies and issues which were raised, embraced and alleged in the EEOC charges and the Class Action Complaint herein in order to buy universal peace, avoid further expense, inconveniences and distractions of burdensome and protracted litigation, and put to final rest the controversies and claims raised in the Class Action by Named Plaintiffs on behalf of themselves and on behalf of the Class;

NOW, THEREFORE, in consideration of the mutual convenants and agreements contained herein, the counsel for the Class, Univac, International, and Local, do hereby agree, subject to the approval of the Court, as follows:

1. Univac and the Local agree to amend the current collective bargaining agreement between Univac and the Local so that it incorporates and reflects the following changes:

a. The various subassembler classifications will be eliminated, a new classification called "Assemblers" will be created, and the following progress rate and wage structure, including current adjustments for wage protection, shall be immediately effective for Assemblers.

Length of Service	Hourly Rate
Start	$6.00
6 months	$6.89

b. The classification of General Laborer will receive the same wage progression as Assemblers set out in (a) above.

c. General Laborers and Assemblers will receive the same promotional and transfer opportunities, except that no person will be considered qualified for promotion to Inspector or Electro-Mechanical Assembler without six months of electronic assembly experience at Univac or elsewhere or trade school training in electronics.

d. Lead persons will be promoted based upon company wide seniority after completion of at least six (6) months in the relevant classification except for Assembler Leads where the experience requirement will be that in the department where the opening exists.

e. The hourly rate for Drilling Machine Operator shall be increased to equal the hourly rate of Production Machine Operator in accordance with this agreement and to settle an outstanding grievance of the Local.

f. Bargaining unit members who are promoted to a position outside the bargaining unit in which position they would be supervising bargaining unit members shall retain seniority accumulated during their service in the bargaining unit for twenty-four (24) months following the date of their promotion.

g. Bargaining unit members shall be advised whenever an opening occurs in a first-line supervisory position, and notice of such openings shall be placed on all Union bulletin boards and a copy sent to Local 2047.

2. Univac agrees that within six (6) months after approval by the Court of the settlement of this case, it will have completed a job analysis of the following eight classifications: Sheet Metal Worker, Die Setter, Heat Treater Welder, Maintenance Mechanic A, Maintenance Mechanic B, Machine Operator A, General Inspector, and Spray Painter. One of the purposes of this job analysis will be to determine the requisite skill levels required of a person about to enter any one of those eight classifications. The above-described job analysis will be conducted by Hay Associates. Hay Associates will prepare position descriptions for each of those jobs based upon the job analysis, which position descriptions will be used by Univac. Hay Associates will make a report concerning the job analysis and will make recommendations regarding the requisite skill levels of an individual about to enter any one of the above-described classifications. All analyses work undertaken by Hay Associates will be consistent with presently accepted professional job analyses standards of the management consultant community specializing in the area of compensation practices and with current efforts to carry out the intent of EEOC regulations dealing with Equal Employment opportunities. The report and recommendations will be made to the Court, which may, in its discretion, order compliance based on any findings or recommendations made by Hay Associates.

3. Univac agrees that it will establish as Plating Equipment Operator those jobs presently performed by Assemblers operating a piece of plating equipment on the grate, and will establish as Electro Mechanical Assembler those jobs presently performed by Assemblers working in the tear-down and final assembly cabinet area.

4. Univac agrees that within six (6) months after approval by the Court of the settlement of this case, it will have established and make use of selection criteria for promotion of an individual to a position of first-line supervisor. The selection criteria will be determined by Hay Associates. Hay Associates shall make a report to the Court after conducting a job analysis of the first-line supervisory positions, with particular reference made to the requisite skills required of a person entering a first-line supervisory positions. The results of this study shall also be made known to the Union and Univac's employees. Univac will implement the selection criteria set forth by Hay Associates. Univac will determine its affirmative action goal for first-line supervisory promotions based upon the criteria and in accordance with the applicable OFCCP and other government regulations. All analyses work undertaken by Hay Associates will be consistent with presently accepted professional job analyses standards of the management consultant community specializing in the area of compensation practices and with current efforts to carry out the intent of EEOC regulations dealing with Equal Employment opportunities. The report and recommendations will be made to the Court, which may, in its discretion, order compliance based on any findings or recommendations made by Hay Associates.

5. Univac agrees to actively encourage its employees to take advantage of its tuition reimbursement program for obtaining skills necessary for promotion, and will distribute a notice to all bargaining unit employees of the trade school or vocational school courses required, if any, for promotion to any position within the bargaining unit, and the identity and location of facilities in the Twin Cities area where such skills can be obtained. Univac shall also distribute a notice to all of its bargaining unit employees stating that seniority is the only determinative factor in being selected for promotion to any of the bargaining unit positions except for the entry-level positions and the eight jobs set forth in paragraph 2 above. With regard to the eight positions set forth in paragraph 2 above, Univac shall distribute a notice to each employee describing the selection criteria for and the requisite skills required of such positions after the report of Hay Associates has been completed.

6. A settlement fund of $1,500,000.00 will be established by Univac and deposited as soon as possible after the Court approves the settlement of this case into an account bearing the highest possible interest and such funds shall be the sole and exclusive source of funds for payment of settlements to members of the class enlarged as hereinafter provided. No contribution to the settlement fund is required to be made by the International or Local.

7. Persons who were initially within the Court's definition of the Class but exercised their right to opt out of the Class shall be given an opportunity to rejoin the Class by withdrawing their election to opt-out and by affirmatively agreeing to become members of the Class and subject

themselves to the jurisdiction of the Court and the terms and conditions of any Orders regarding settlement and dismissal made by the Court and to receive benefits therefrom. It is agreed by and between the parties that they will request the Court to enter an Order directing that all persons who elected to opt-out be given a Notice in the form of Exhibit I hereto, together with an "Election of Participation" in the form of Exhibit II hereto, which each individual that did opt-out must file not later than twenty (20) days after the date of such Notice in order to withdraw their election to opt-out and rejoin the Class.

8. Settlement payments will be made in accordance with the formula contained in paragraph 9 below to individuals that return to the Clerk of Court a request to receive a settlement payment in the form of Exhibit II of an "Election of Participation" and within the time limits and under the conditions imposed by the Court.

9. The amount of settlement payments to each class member will be based on the following formula:

> Settlement payments will be calculated for each individual requesting such payment by multiplying the amount in the settlement fund ($1,500,000.00) by that individual's settlement factor, which in turn has been determined by dividing that individual's settlement points based upon an individual's years of service:

0 - 1 year	0.5 points
1 - 2 years	1.0 points
2 - 3 years	1.5 points
3 - 4 years	2.0 points
4 - 5 years	3.0 points
5 - 6 years	4.0 points
6 - 7 years	5.0 points
7 - 8 years	6.5 points
8 - 9 years	8.0 points
9 - 10 years	9.5 points
10 - 11 years	11.0 points
11 - 12 years	13.0 points
12 - 13 years	15.0 points
13 - 14 years	17.0 points
14 - 15 years	19.0 points
15 - 16 years	21.0 points
16 and over years	25.0 points

by the total number of settlement points for all individuals returning a request for a settlement payment.

$$\frac{PI}{PT} \times \$1{,}500{,}000.00 = \text{Individual Settlement Payment}$$

Years of service will be equal to accumulated service and will be calculated using the date of hire or rehire as the beginning point and the date the Court approves the settlement as the ending point.

Settlement payments for each individual will be made by check issued by Univac within 30 days after the Court has issued its order finally approving the compromise and settlement of the Class Action.

Each class member will be apprised of the range of settlement payments by notification to each class member who has become a participating member of the class in the past or pursuant to the procedures set forth in paragraph 7 above.

10. After the date upon which agreement was reached between the parties hereto as set forth above and as a matter independent of such agreement, Plaintiffs' counsel advised counsel for Defendants that Plaintiffs' counsel deemed it advisable to petition the Court for an Order allowing attorneys' fees, costs and expenses at the same time that this Stipulation of Settlement is submitted to the Court for approval. Counsel for Defendants agreed to this proposal, and thereafter Plaintiffs' counsel advised counsel for Defendants that they would seek attorneys' fees in the amount of $500,000.00 and reimbursement to Plaintiffs and their counsel for costs and expenses in the approximate amount of $350,000.00. Plaintiffs' counsel further advised counsel for Defendants that were they to seek attorneys' fees based strictly upon the amount of time expended at customary hourly rates charged by Plaintiffs' counsel, the total fees sought would be in excess of $603,000.00 more than $103,000.00 in excess of the fees Plaintiffs' counsel intend to seek. All attorneys' fees, costs and expenses incurred by Plaintiffs and Plaintiffs' counsel in the Class Action, in whatever amount the Court ultimately allows, shall be paid out of an attorneys' fees and expense fund separately established by Univac. No contribution to the attorneys' fees and expense fund is required to be made by the Local or International. If the Petition submitted to the Court by Plaintiffs' counsel supports and conforms with the representations made by

Plaintiffs' counsel as set forth above, Defendants and their counsel have advised that they will, if asked by the Court, state that, in their judgment, the petition for allowance of fees, costs and expenses submitted by Plaintiffs and their counsel appears reasonable. All parties hereto acknowledge that the ultimate determination of the question of attorney's fees, costs and expenses is within the sole discretion of the Court, and by agreeing to the provisions of this paragraph the parties hereto do not intend to contract as to the amounts which shall be allowed to Plaintiffs and Plaintiffs' counsel as attorneys' fees, costs and expenses.

11. Costs of any and all notices required to be sent pursuant hereto, and the cost of any other mailings required to be sent pursuant hereto, shall be borne in equal proportions by Univac, the Local and the International. All other costs of administration of this settlement shall be paid by Univac.

12. As a condition of this agreement the Class Members, and each of them, release Univac, the Local, the International, and each of them, jointly and severally, from any and all manner of action or actions, cause or causes of action, suits, debts and sums of money, claims and demands whatsoever, in law or in equity, embraced or alleged in the charges filed with the EEOC related state charges and the Class Action Complaint herein. All settlement checks issued by Univac to Class Members shall bear the following restrictive endorsement:

"RELEASE"

By endorsing and negotiating this instrument the undersigned agrees to be bound by the judgment entered in the matter of Elliott, et al. v. Sperry Corporation, et al., by the United States District Court for the District of Minnesota (Civil Action No. 4-74-627), and the undersigned releases Sperry Corporation, Univac, the International Brotherhood of Electrical Workers, Local Union No. 2047 of the International Brotherhood of Electrical Workers, and the named plaintiffs, and each of them, jointly and severally, from any and all manner of action or actions, cause or causes of action, suits, debts and sums of money, claims and demands whatsoever, in law or in equity, embraced and alleged as described in charges filed with the EEOC, related state charges and the Class Action Complaint herein.

13. Each Defendant agrees to the dismissal, with prejudice, of every Cross-Claim, including Cross-Claims for indemnity and contribution, which it asserted or could have asserted against any other Defendant.

14. As a condition of this agreement, the Named Defendants, and each of them, release all Class Members, and each of their respective heirs, administrators, executors, successors and assigns, from any and all manner of action or actions, cause or causes of action, suits, debts and sums of money, claims and demands whatsoever, in law or in equity, which any or each of them may have or have had, whether known or unknown, contingent or liquidated, arising out of the assertions embraced and alleged in the charges filed with the EEOC and the Class Action Complaint herein or the resulting litigation with regard to defense costs and attorneys' fees, or any other related costs of litigation.

15. It is understood and agreed that this agreement, and the adherence to and compliance with it by the parties, shall be supervised, monitored, and construed exclusively by the Court, and the parties hereto agree to and do request that the Court retain exclusive jurisdiction of this matter until such time as the Court determines that such supervisory jurisdiction is no longer required. During the period of time that the Court retains exclusive jurisdiction of this matter, the non-compliance with this Stipulation of Settlement as determined by the Court shall constitute contempt and the party in contempt shall be subject to any and all sanctions the Court may impose, in its discretion. It is understood and agreed that Univac shall make a report to the Court, no later than December 1, 1981, with copies to counsel for all other parties, detailing the steps which it has taken to comply with the terms and conditions of this agreement. This Stipulation of Settlement shall impose no obligation or responsibility upon the International to monitor, review or investigate the treatment of women under the collective bargaining agreements in effect from time to time between the Local and Univac, or under the provisions of any judgment or decree hereafter to be entered in these proceedings pursuant to this Stipulation.

16. It is agreed and understood that this Stipulation will be submitted to the United States District Court for the District of Minnesota, Fourth Division with the recommendation of the counsel for all parties that this Stipulation and the settlement contemplated hereby are fair, reasonable and adequate and shall request an Order scheduling a prompt hearing to be held at which the Court may determine the fairness, reasonableness and adequacy

of this Stipulation and settlement in accordance with the requirements of Federal Rules of Civil Procedure 23 (e) and in connection therewith:

a. Requiring that notice of hearing substantially in the form attached hereto as Exhibit A shall be given to the Class Members by mail, and

b. Providing that any Class Member who objects to this Stipulation or the judgment to be entered thereon may appear at the hearing and show cause why the settlement proposed in this Stipulation should not be approved as fair, reasonable and adequate and why a judgment should not be entered thereon, provided that, except by special leave of Court, any such objection must be made in writing and filed with the Court seven (7) days prior to the date of the hearing fixed by the Court in its order for hearing by delivery to:

Clerk of United States District Court
110 South Fourth Street
Minneapolis, Minnesota 55401

Any Class Member who fails to object at the time and in the manner prescribed herein shall be foreclosed forever from raising such objections.

17. If the Court approves the settlement contemplated hereby, an order pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure shall forthwith be entered as follows:

a. Approving the settlement set forth in this Stipulation as fair, reasonable and adequate;

b. Except as provided in paragraphs 15, 17 (d) and 18, dismissing this action in all its counts, and in all respects, and all claims which were embraced or alleged in the charges filed with the EEOC or the Class Action Complaint herein, on the merits, and with prejudice to all Class Members, and in favor of Univac, Local, International as well as past and present officers, directors, employees of Univac, Local and International and each of their respective heirs, administrators, executors, successors and assigns, and without the award of costs to any parties;

c. Forever barring and enjoining prosecution by any Class Member of any and all other actions which in any way or manner involve the claims settled hereby, and any action commenced prior to or after the judgment herein which arises out of or is based upon or connected with any matter, fact or thing alleged in this Class Action against Defendants; and forever barring and enjoining prosecution by any Named Defendants of any and all actions against any Class Member, with regard to any and all claims asserted and alleged against Defendants contained in the charges filed with the EEOC or the Class Action Complaint herein, ot for recovery of defense costs and litigation fees, dues, or any other costs associated with this litigation; and

d. Reserving jurisdiction of this Court with respect to the award of attorneys' fees and expenses as provided in paragraph 18 below and reserving jurisdiction over supervision and enforcement of the agreement as contemplated in paragraph 15: and

e. Determining that there is no just reason for delay of entry of final judgment and expressly directing the entry of final judgment as provided above.

f. Incorporating the terms of the Stipulation of Settlement by reference to said Stipulation.

18. Following the hearing on the fairness, reasonableness, and adequacy of this Stipulation of Settlement, Plaintiffs' counsel may make application to the Court for an award of attorneys' fees and expenses with reference to the Class Action and such application shall be heard at such time and place as the Court shall determine. Univac shall deposit at the time of the approval of the settlement of this Class Action the funds referred to in paragraph 10 in an account bearing the highest available interest, which interest shall be paid to Plaintiffs and Plaintiffs' counsel in addition to the fees and costs set forth in paragraph 10.

19. It is understood and agreed that counsel for Defendants and Plaintiffs' counsel shall joint in a petition to the Court for approval of this settlement.

20. It is understood and agreed that this settlement agreement shall be construed in accordance with the laws of the United States and the State of Minnesota.

IN WITNESS WHEREOF, the parties to the Class Action have caused this Stipulation of Settlement to be signed by their respective counsel.

MEAGHER, GEER, MARKHAM, ANDERSON,
ADAMSON, FLASKAMP &BRENNAN
By /s/ J. Richard Bland
J. Richard Bland
Bradley M. Jones
2250 IDS Center
Minneapolis, Minnesota 55402
HVASS, WEISMAN & KING
By /s/ Richard A. Williams, Jr.
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Telephone: (612) 336-5831
Attorneys for Defendant Local
Union No. 2047, International
Brotherhood of Electrical Workers

EXHIBIT A

PLEASE READ THIS CAREFULLY

YOUR RIGHTS ARE AFFECTED BY THIS NOTICE

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Delores Elliott, Helen Ambrose and all persons similarily situated,

Plaintiffs,

vs.

Sperry Rand Corporation, a Delaware corporation; the International Brotherhood of Electrical Workers, AFL-CIO, and Local Union No. 2047 of the International Brotherhood of Electrical Workers,

Defendants.

4-74 CIVI L627

TO: ALL PAST AND PRESENT FEMALE EMPLOYEES OF THE LOCAL 2047 BARGAINING UNIT:

IMPORTANT LEGAL NOTICE

As you were previously informed, this lawsuit was brought as a Class Action against Sperry Rand Corporation ("Univac"), the International Brotherhood of Electrical Workers (IBEW), and Local Union No. 2047 of the

IBEW ("Local") alleging that they violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §200e, et seq.

Although defendants deny the allegations of the Complaint and the EEOC charge and further deny any liability to plaintiffs or the members of the Class, in order to buy peace and avoid added expense and annoyance of litigation, an agreement has been reached between defendants and representatives of the Class on a plan to settle this lawsuit. As a Class member, you will receive benefits from this settlement.

Among the most important features of the proposed settlement are the following:

1. A settlement fund of $1,500,000.00 will be established by Univac and such fund shall be the exclusive source of funds for payment of settlements to members of the Class.

2. Persons who were within the Court's definition of the Class, but who subsequently exercised their right to opt out of the Class, shall be given an opportunity to rejoin the Class in order to participate in the settlement.

3. Settlement payments will be calculated for you by multiplying the amount in the settlement fund ($1,500,000.00) by your "settlement factor." Your "settlement factor" will be determined by dividing your "settlement points" by the total number of settlement points for all Class members. Your "settlement points" will be allocated based upon years of service to Univac as follows:

0 - 1 year	.5 points
1 - 2 years	1.0 points
2 - 3 years	1.5 points
3 - 4 years	2.0 points
4 - 5 years	3.0 points
5 - 6 years	4.0 points
6 - 7 years	5.0 points
7 - 8 years	6.5 points
8 - 9 years	8.0 points
9 - 10 years	9.5 points
10 - 11 years	11.0 points
11 - 12 years	13.0 points
12 - 13 years	15.0 points
13 - 14 years	17.0 points
14 - 15 years	19.0 points
15 - 16 years	21.0 points
16 and over years	25.0 points

The formula, therefore, is:

$$\frac{\text{Your Settlement Points} \times \$1{,}500{,}000.00}{\text{Total Number of Settlement Points}} = \begin{array}{l}\text{Your}\\ \text{Settlement}\\ \text{Payment}\end{array}$$

Years of service will be equal to accumulated service calculated using the date of hire or rehire as a beginning point and the date the Court approves the settlement as an ending point.

4. Settlement payments will be made to you by a check issued by Univac within 30 days of the Court's Order approving this settlement. If all persons within the definition of the Class participate in this settlement, a person with less than one year of service to Univac would receive a

settlement payment of approximately $35.00 and a person with over sixteen years of service would receive a settlement payment of approximately $1,750.00.

5. Univac and the Local have agreed to amend the current collective bargaining agreement between them so that it incorporates and reflects the following changes:

a. The various subassembler classifications will be eliminated, a new classification called "Assemblers" will be created, and the following progress rate and wage structure, including current adjustments for wage protection, shall be immediately effective for Assemblers.

Length of Service	Hourly Rate
Start	$6.00
6 months	$6.89

b. The classification of General Laborer will receive the same wage progression as Assemblers set out in (a) above.

c. General Laborers and Assemblers will receive the same promotional and transfer opportunities, except that no person will be considered qualified for promotion to Inspector or Electro-Mechanical Assembler without six months of electronic assembly experience at Univac or elsewhere or trade school training in electronics.

d. Lead persons will be promoted based upon company wide seniority after completion of at least six (6) months in the relevant classification except for Assembler Leads where the experience requirement will be that in the department where the opening exists.

e. The hourly rate for Drilling Machine Operator shall be increased to equal the hourly rate of Production Machine Operator in accordance with this agreement and to settle an outstanding grievance of the Local.

f. Bargaining unit members who are promoted to a position outside the bargaining unit in which position they would be supervising bargaining unit members shall retain seniority accumulated during their service in the bargaining unit for twenty-four (24) months following the date of their promotion.

g. Bargaining unit members shall be advised whenever an opening occurs in a first-line supervisory position, and notice of such openings shall be placed on all Union bulletin boards and a copy sent to Local 2047.

6. Univac agrees that within six (6) months after approval by the Court of the settlement of this case, it will have completed a job analysis of the following eight classifications: Sheet Metal Worker, Die Setter, Heat Treater Welder, Maintenance Mechanic A, Maintenance Mechanic B, Machine Operator A, General Inspector, and Spray Painter. One of the purposes of this job analysis will be to determine the requisite skill levels required of a person about to enter any one of those eight classifications.

7. Univac agrees that it will establish as Plating Equipment Operator those jobs presently performed by Assemblers operating a piece of plating equipment on the grate, and will establish as Electro Mechanical Assembler those jobs presently performed by Assemblers working in the tear-down and final assembly cabinet area.

8. Univac agrees that within six (6) months after approval by the Court of the settlement of this case, it will

have established and make use of selection criteria for promotion of an individual to a position of first-line supervisor.

9. Univac agrees to actively encourage its employees to take advantage of its tuition reimbursement program for obtaining skills necessary for promotion. Univac shall also distribute a notice to all of its bargaining unit employees stating that seniority is the only determinative factor in being selected for promotion to any of the bargaining unit positions except for the entry-level positions and the eight jobs set forth in paragraph 6 above.

10. Persons who were initially within the Court's definition of the Class but exercised their right to opt out of the Class shall be given an opportunity to rejoin the Class by withdrawing their election to opt out and by affirmatively agreeing to become members of the Class and subject themselves to the jurisdiction of the Court and the terms and conditions of any Orders regarding settlement and dismissal made by the Court and to receive benefits therefrom.

11. A separate fund has been established in addition to the $1,500,000.00 settlement fund for the payment of plaintiffs' expenses and attorneys' fees, and if approved by the Court, expenses in an amount up to $350,000.00 and attorneys' fees in an amount up to $500,000.00 might be paid by Univac.

12. Costs of any and all notices required to be sent pursuant hereto, and the cost of any other mailings required to be sent pursuant hereto, shall be borne in equal proportions by Univac, the Local and the International.

All other costs of administration of this settlement shall be paid by Univac.

A copy of the Stipulation of Settlement and other papers relating to this lawsuit are on file with the Clerk of the United States District Court, 110 South Fourth Street, Minneapolis, Minnesota. You may inspect these documents at the Clerk's office between 8:30 a.m. and 5.00 p.m., Monday through Friday.

The Court must approve this settlement. The Court has scheduled a hearing to be held on ———, 19——, at ———— at the United States Courthouse in Minneapolis to determine whether the proposed settlement is fair, reasonable and adequate and should be approved by the Court.

You are entitled to object to all or any part of the settlement and to have your objection ruled upon by the Court. IF YOU WISH TO OBJECT TO THE APPROVAL OF THIS SETTLEMENT, YOU MAY APPEAR AT THE HEARING AND SHOW CAUSE, IF ANY, AS TO WHY THE SETTLEMENT SHOULD NOT BE APPROVED AS FAIR, REASONABLE, AND ADEQUATE AND WHY THIS ACTION SHOULD NOT BE DISMISSED ON THE MERITS AND WITH PREJUDICE AS TO DEFENDANTS.

If you wish to object to the settlement, your objection must be submitted in writing to the Court no later than ———, 19——. Your objection should be mailed to:

Clerk of United States District Court
110 South Fourth Street
Minneapolis, Minnesota 55401

with copies mailed to:

J. Richard Bland, Esq.
Bradley M. Jones, Esq.
2250 IDS Center
Minneapolis, Minnesota 55402

David S. Doty, Esq.
Sally A. Johnson, Esq.
4344 IDS Center
Minneapolis, Minnesota 55402

Hyman Edelman, Esq.
William Z. Pentelovitch
1800 Midwest Plaza
Minneapolis, Minnesota 55402

James T. Hansing, Esq.
1208 Plymouth Building
Minneapolis, Minnesota 55402

You may consult and retain your own legal counsel if you desire. You may also address questions to:

J. Richard Bland, Esq.
2250 IDS Center
Minneapolis, Minnesota 55402
Telephone: (612) 338-0661

If you fail to object in the manner prescribed herein, you will have waived your objection, you will be bound by the Court's determination, and you will be foreclosed forever from raising an objection without special permission of the Court.

In the event that the hearing on this settlement does not resolve all questions or objections on ———, 19——, the Court may order further proceedings to be held. No further notice will be sent to you regarding any such continuations of the hearing or related proceedings unless ordered by the Court.

Dated: ——————

BY THE COURT

Earl R. Larson
United States District Court Judge

EXHIBIT I

REQUEST TO REJOIN CLASS

IMPORTANT

If you requested exclusion from the class ("opted out") your rights are affected by this form.

I, ——————, having a Sperry clock number of ——————, initially decided to remove myself from the class ("opted out") and now wish to withdraw the election to "opt out" and rejoin the class, thereby becoming eligible to accept the benefits and cash settlement offered to class members by executing an "Election of Participation" and agreeing to subject myself to the jurisdiction of the Court and the terms and conditions of and orders regarding settlement and dismissal made by the Court. I have read the notice provided to me and understand its effect, now agreeing to become a class member.

Date——————

——————————
Signature

This Request must be received in P. O. Box No. 9767, Minneapolis, Minnesota, 55440, and postmarked no later than ———, 1981 to be considered.

EXHIBIT II

ELECTION OF PARTICIPATION

IMPORTANT

All class members and persons initially requesting exclusion from the class and filing a request to rejoin the class must return this form to receive a settlement check.

REQUEST FOR SETTLEMENT PAYMENT

I, ———, having a Sperry Univac clock number of —————, hereby request that I be paid an amount in settlement of this action as computed using the agreed upon formula. I understand that by requesting and accepting this settlement I hereby release forever the defendants from any and all claims made in the Class Action Complaint based upon the EEOC charges number TMK3-0617 and TPA3-0461 and the acts or failures to act by defendants providing the basis for this suit. I also understand that I will be bound by the judgment entered by the Court.

Date————————

Signature

This Request must be received in P. O. Box No. 9767, Minneapolis, Minnesota, 55440, and postmarked no later than ———, 1981 to be considered.

(5)

FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-414

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HELEN M. AMBROSE,
Petitioner,

AND ALL OTHER PERSONS SIMILARLY SITUATED,

vs.

SPERRY (RAND) CORPORATION, a Delaware Corporation; THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO and LOCAL UNION NO. 2047 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Respondents,

J. RICHARD BLAND, ESQ., BRADLEY M. JONES, ESQ., and RICHARD A. WILLIAMS, ESQ.,
Respondent(s).
(class counsel).

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF OF PETITIONER

HELEN M. AMBROSE
3528 27th Avenue South
Minneapolis, Minnesota 55406
(612) 729-0010
Petitioner Pro Se

BEST AVAILABLE COPY

1985—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

THE PARTIES

(as listed by Sperry, et al.)

Delores E. Elliott	Plaintiff
Helen Ambrose	Plaintiff-Petitioner
Class of all other persons similarly situated	Plaintiffs
Sperry (Rand) Corporation	Defendant-Respondent
The International Brotherhood of Electrical Workers, AFL-CIO	Defendant-Respondent
Local Union No. 2047 of the International Brotherhood of Electrical Workers	Defendant-Respondent

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Respondent(s).
(class counsel).

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for the Eighth Circuit

REPLY BRIEF OF PETITIONER

REPLY TO ISSUES FIRST RAISED BY RESPONDENTS

Respondent Sperry claims that the Ambrose petition represents a collateral attack on the settlement orders; argues that the petition should be treated as a motion under Rule 60(b); and then claims that the motion comes one and one half years too late and after the Eighth Circuit has issued its approval and after all parties had "irretrievably" relied upon the final settlement terms; and claims that the motion must be filed within one year; that action by the court is discretionary; that the Circuit Court will not disturb that discretionary exercise absent abuse; and, inter alia, that a too liberal application of Rule 60 will undermine finality of judgment(s) and would discourage settlement of (class) action(s). (See Sperry brief at pages 5 and 6). The respondent counselor's brief argues similarly at pages 10 to 13. Each respondent as well as the lower courts call for final judgment.

Petitioner would that the Court find that finality in judgment did occur upon the occasion of the motion for class certification. That in the positions taken, statements made, briefs filed and orders issued by the (defendant and plaintiff counsel, the District Court and the Eighth Circuit Court), on the issue of class representation under Rule 23(a)(4) as to conflicts of interest, the aforesaid parties are judicially estopped from later taking a contradictory or inconsistent position. The foregoing would include: the brief by plaintiff counsel; the Sperry petition and brief for Writ of Mandamus; District Court Memorandum of May 27, 1976; the Eighth Circuit Order of May 11, 1977; and any and all briefs filed by the I.B.E.W. union(s).

Simply put, it is established through the doctrine of judicial estoppel that the counselors (and their law firms) and the lower courts having established their positions on the question of conflicts of interest under Rule 23(a)(4) may not later in litigation take a contradictory position.

> "Under the doctrine of 'judicial estoppel' a party is bound by his judicial declarations and may not contradict them in a subsequent proceeding involving same issues and parties." *Sailes v. Jones,* 17 Ariz. App. 593, 499 P.2d 721, 726.
>
> "Under this doctrine, a party who by his pleadings, statements or contentions, under oath, has assumed a particular position in a judicial proceeding is estopped to assume an inconsistent position in a subsequent action." *Yarber v. Pennell,* Tex. Civ. App., 443 S.W. 2d 382, 384.

The extreme contradictions by Respondent Sperry and the I.B.E.W. union(s) are immediately recognized by the vigorous union briefs and the Writ of Mandamus used by Sperry when attacking the right of named plaintiffs to represent the class, but then accepted the re-association of the Hvass law firm whom they knew held interests adverse to that of the class. In 1976, the brief filed by J. Richard Bland and W. D. Flaskamp of the Meagher, Geer, et al, law firm, defended the representative status of named plaintiffs at pages 13 and 15 of said brief. Today they attack and they have adopted the same material and same vituperative style as the union(s) used in 1976. Their contradictions are impermissable but understandable because they are now defending their million dollar fee and cost award and in 1976 they needed a "key" to the court house door.

But even more profound is the inconsistent and contradictory conduct engaged in by the District Court and the Circuit Court. Petitioner has supplied that information sufficiently in the Petition to the Court at pp. 6, 7, 8, 16, 17, 22, and 23 and has characterized the lower court's inconsistent or contradictory conduct as a repudiation of its Memorandum Order of May 27, 1976. To put it as succinctly as I can, the courts below established rules and criteria to be applied to Rule 23 class representatives but failed to apply them fairly and reasonably to named plaintiffs and to counselors at bar. Thus, petitioner and all class members were denied the fundamental right to a fair trial, effective counsel and an impartial tribunal. See *Brown v. United States,* 377 F. Supp. 530 (1974) at p. 531: "It is basic due process that the government cannot set up regulations and then disregard them."

By the act(s) of applying Rule 23(a)(4) strictly, and subjecting named plaintiffs to close and continuing scrutiny but failing to subject Hvass, et al, to the same tests, the court acted in abuse of discretion, beyond the law and beyond the constraints of the Rules Enabling Act of 1966. In the commission of that first abuse of discretion (silently acquiescing in the Hvass re-association and failure to notify the class) the court should be found to be without jurisdiction as to this litigation. See: *Wheeler v. New Brunswick & C.R. Co.,* 115 U.S. 2a, 5 S.Ct. 1061: "Silence is equivalent to a concealment, where it is the duty of a party to speak". See also: *Tyler v. Savage,* 143 U.S. 79, 12 S.Ct. 340: "The suppression of a material fact which a party is bound to disclose is equivalent to a false representation."

In view of the above, petitioner believes that the courts below and the respondents here are ill posed to call for finality of judgment now. Petitioner respectfully requests that the Court would give remedy to all class members and to petitioner under the Supreme Court Rule 17 1(a) by finding that the District Court and the Eighth Circuit

> has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Respondents raise the issue of the monetary awards accepted by the class members. The claim is made that if settlement is set aside the class members may be required to return such monies; that Sperry may revert back to their pre-1972 disparate treatment of women; and that the best interests of the class have been served. Respondents also contend that Petitioner believes or expects Title VII to be a panacea and claim that litigation was a "contest".

Though Sperry parades before the Court that 3,105 women received a monetary award of $1,762,618.47 the Court may better measure the contentment of those women by reflecting on the fact that the net individual awards ranged from about $30.00 to $1,090.00. Not paraded before the Court was the one million dollar attorney fee and cost award. To suggest that class members may be required to return monies is tantamount to saying that victims of fraud and concealment are required to make their victimizer whole. See: *Glus v. Brooklyn Eastern Terminal,* 359 U.S. 231 (1959). Mr. Justice Black:

> "To decide this case we need look no further than the maxim that no man may take advantage of his own wrong. . . ."

That Sperry would plunge back into its pre-1972 discriminatory practices is to accept that they have "emerged" and it also suggests that the plaintiff class would have prevailed on back pay claims. See also Ambrose Appendix at A-95-96, the 1982 sex discrimination grievance.

Petitioner does *not* review Title VII as a "panacea" but rather understands Title VII to be a statute framed in equity giving courts broad powers in framing remedy deemed to be due and appropriate based upon discovery made through zealous advocacy of loyal lawyers brought before an impartial tribunal. We had neither the lawyers giving undivided loyalty nor an impartial tribunal. It was *no* contest.

CONCLUSION

This case presents issues of important public policy. This Court should grant the Petition for Certiorari or in the alternative remand for all appropriate remedy for the class and in the public interest.

October 14, 1985.

Respectfully submitted,

/s/ HELEN M. AMBROSE
Helen M. Ambrose
3528 27th Avenue South
Minneapolis, Minnesota 55406
(612) 729-0010
Petitioner Pro Se

CERTIFICATE OF SERVICE

Petitioner hereby certifies that copies of this brief will be served upon all parties of interest by U.S. certified-registered mail on this 16th day of October, 1985.

/s/ HELEN M. AMBROSE
Helen M. Ambrose